91-1707

No. _____

Supreme Court
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In The

Supreme Court of the United States

October Term, 1991

IN RE
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

Petition For Writ Of Mandamus, Prohibition Or Other Appropriate Remedy To The United States District Court Central District of California

Petition For Writ Of Mandamus
APPENDIX, VOLUME I
PAGES A-1 - A-165

ROBERT F. KANE
Counsel of Record for Petitioner,
UNITED SERVICES AUTOMOBILE ASSOCIATION
ROPERS, MAJESKI, KOHN, BENTLEY, WAGNER & KANE
1001 Marshall St.
Redwood City, CA 94063
(415) 364-8200

GUY O. KORNBLUM
KORNBLUM & FERRY
650 California Street, Fifth Floor
San Francisco, CA 94108
(415) 392-7800

PAUL R. FINE
DANIELS, BARATTA & FINE
1801 Century Park East, Ninth Floor
Los Angeles, CA 90067
(310) 556-7900

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS, Plaintiffs, -vs- UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	No. CV-91-3615-WFN ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Before the Court is defendant's Motion to Dismiss based on lack of subject matter jurisdiction heard by the Honorable Wm. Fremming Nielsen on November 8, 1991. Defendant was represented by Paul R. Fine; plaintiff was represented by William N. Shernoff and Frank N. Darras. At the conclusion of the hearing additional briefing was ordered. Having reviewed the record, having heard oral argument of counsel and being fully advised, this Court DENIES the Motion to Dismiss.

Plaintiffs initiated this action to recover sums allegedly due under a homeowner's insurance policy issued by defendant. Defendant brought this Motion to Dismiss alleging that as an unincorporated association with over 180,000 members who are domiciled in the State of California, there is no diversity for the purposes of federal subject matter jurisdiction.

Federal courts have subject matter jurisdiction over civil suits filed when the amount in controversy is over

$50,000 and there is complete diversity between opposing parties. 28 USC § 1332(a). When an entity is a named party, its domicile for diversity purposes depends upon its basic nature. If the entity is a corporation, it is considered to be domiciled in the state of its incorporation and the state where it has its principal place of business. 28 USC § 1332(c); *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). For non-corporate entities, the Supreme Court's *Carden* decision carefully set out "that diversity jurisdiction in a suit by or against [a non-corporate] entity depends on the citizenship of 'all the members.' " *Id.* at 195 citing *Chapman v. Barney*, 129 U.S. 677, 682 (1889).

The key issue is whether or not USAA is to be treated as a corporate or a non-corporate entity. It is important to note that in *Carden* the artificial entity was a partnership, and the court specifically distinguished the case of *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). *Russell* involved "the entity known as a *sociedad en comandita*, created under the civil law of Puerto Rico, [and held it] could be treated as a citizen of Puerto Rico for the purposes of determining federal court jurisdiction." *Carden* at 189-90. The *Carden* court went on to state "[t]here could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rico *sociedad en comandita*) would be treated for the purposes of the diversity statute to what *Russell* called '[t]he tradition of the common law,' which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnership.' "[1] *Id.* at 190. Thus *Carden*, a 5-4 decision, has

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[1] *Bouligny* held that an unincorporated labor union is not a citizen for purposes of diversity. *Steelworkers v. R.H. Bouligny,*

(Continued on following page)

strong language regarding non-corporate entities being unable to assert a corporate type of citizenship yet it is noteworthy that the Supreme Court did not draw that black and white line of jurisdictional status simply based upon the label corporate or non-corporate entity. As the Supreme Court did not draw that line, neither will this Court. The question then becomes whether USAA has sufficient corporate traits to be within the *sociedad en comandita's* "corporate" boundaries.

Carden also notes that *Bouligny* "considered and rejected applying *Russell* beyond its facts." *Carden*, 494 U.S. at 190 n. 2. In *Russell* the court found that:

> The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. . . . The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore to call the *sociedad en comandita* a limited partnership in the common law sense . . . is to invoke a false analogy. In the law of its creation, the *sociedad en comandita* is consistently regarded as a juridical person. It may contract, own property and transact business, sue and be sued in its own name and right. . . . Its members are not thought to have a sufficient personal interest in

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(Continued from previous page)

Inc., 382 U.S. 145 (1965). *Bouligny* distinguished *Russell* by pointing out that " 'the *sociedad en comandita* is consistently regarded as a juridical person.' " *Id.* at 151 quoting *Russell*, 288 U.S. at 480-81. There can be no doubt that USAA is a juridical person, as evidenced by the number of Texas statutes regulating its operations and its treatment under Texas law. *See Kiepfer v. Beller*, 944 F.2d 1213 (5th Cir. 1991).

> a suit brought against the entity to entitle them to intervene as parties defendant. . . . It is created by articles of association filed as public records. . . . Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. . . . Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited and they alone may perform acts legally binding on the *sociedad*."

Russell, 288 U.S. at 480-81. The opinion goes on to list many other similarities between the *sociedad* and corporations. In the instant case, USAA easily fits within the facts of *Russell*. USAA is a statutory entity governed by very specific Texas insurance laws. *See* Chapter 19 of the Texas Insurance Code. Additionally, federal laws treat USAA in a corporate manner. *See Republic Underwriters v. Ford*, 100 F.2d 511, 514 (5th Cir. 1938) (reciprocal exchange treated as an insurance corporation under the bankruptcy law); *Kurzner v. United States*, 413 F.2d 97, 101-02 (5th Cir. 1969) (IRS Code definition of corporation includes associations and insurance companies but distinguishes partnerships and trusts from corporations). Plaintiffs have also cited *Kiepfer v. Beller*, 944 F.2d 1213 (5th Cir. 1991) for the proposition that a reciprocal insurance exchange is treated as a corporation under Texas law. In *Kiepfer*, the Fifth Circuit needed to decide whether a director of a reciprocal insurance exchange was an agent of that exchange. The court resolved the issue by resorting to the provisions of the Texas Business Corporation Act, noting that "[w]hen the Insurance Code fails to address some question of corporate law, it is supplemented by the

provisions of the Texas Business Corporation Act to the extent that the Business Corporation Act is consistent with the Insurance Code. *See Texas Business Corp. Act. art. 9.14* (West Supp. 1991)." *Id.* at 1218 n. 1. Additional persuasive arguments of USAA's corporate-like personality can be found in USAA's Brief in Opposition to Motion to Remand filed in *Pridgen v. United Services Automobile Association*, No. 84-247-ALB-AMEF (U.S.D.C. M.D. GA. Nov. 1984) attached as Exhibit A to Plaintiff's Supplemental Briefing in Opposition to Motion to Dismiss filed December 9, 1991.

This Court is not unmindful of the decisions outside of the Ninth Circuit declining to treat USAA as a juridical person for purposes of diversity. Most notable of these cases are *Baer v. United Services Automobile Association*, 503 F.2d 393, 395 (2nd Cir. 1974) and *Tuck v. United Services Automobile Association*, 859 F.2d 842 (10th Cir. 1988), *cert den.* 489 U.S. 1080 (1989). Both of these cases were pre-*Carden*, relied on *Bouligny* and did not discuss *Russell*. Though *Bouligny* appeared to undercut *Russell*, *Carden* makes it clear that *Russell* still has precedential value and must be considered in any analysis of an association as a juridical person.

Therefore under the civil laws of Texas, USAA is treated as a corporation as much if not more so than the *sociedad en comandita* in *Russell* and is entitled to be treated as a corporation for diversity purposes in federal court.

Also pending is plaintiff's Motion for Sanctions which will continue under advisement. Accordingly,

IT IS ORDERED that defendant's Motion to Dismiss for lack of subject matter jurisdiction be and the same is hereby DENIED.

IT IS SO ORDERED. The Clerk is hereby DIRECTED to enter this Order and forward copies to counsel.

DATED this ___ day of February, 1992.

WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION Petitioner, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, and LAUGHLIN E. WATERS, et al., Real Parties in Interest.	No. 92-70122 DC# CV-91-3615-WFN Central California ORDER (Filed Mar. 13, 1992)

Before: FARRIS, O'SCANNLAIN and T. G. NELSON, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). The motion for stay pending consideration of the petition is denied as moot.

T. G. NELSON, Circuit Judge, dissenting:

A separate dissent will be entered at a later date.

(Filed Mar. 26, 1992)

T. G. NELSON, Circuit Judge, Dissenting:

I respectfully dissent from the Order Denying the Petition for Writ of Mandamus.

Laughlin E. Waters, and his wife Voula, (collectively "Waters") the real parties in interest, are insured under a

policy of insurance issued by USAA, covering their residence from physical damage due to certain causes. Their house was damaged by fire and USAA undertook to adjust the loss. Disagreements arose and the result was an action filed by Waters in the Federal District Court in the Central District of California contending that USAA had breached its duty of good faith and fair dealing by failing to offer adequate reimbursement for the damages sustained by their home and in unreasonably delaying payments to them.

USAA is a "reciprocal or interinsurance exchange," existing under the laws of the State of Texas. USAA filed a motion to dismiss the complaint on the ground that the district court lacked subject matter jurisdiction because an unincorporated association is a citizen of each state in which it has members. USAA has 186,000 members in California, which would destroy diversity between itself and Waters if USAA is correct in its contentions.

Waters opposed USAA's motion and also requested that the district court award sanctions in the amount of $1.72 million. The basis of Waters' sanction request is that USAA has been inconsistent in its approach to federal court subject matter jurisdiction in many other cases across the United States. They argue that USAA's abuse of the system makes it appropriate for the district court to assess sanctions of $10,000 in each of the 172 cases in which, they contend, USAA had taken inconsistent positions about subject matter jurisdiction. The district court denied USAA's motion to dismiss and took under advisement the request for sanctions. There are currently pending a hearing date on the motion for sanctions of May 14, 1992, and a trial date for the basic case of June 22, 1992.

USAA requested the district court to certify its decision on the motion to dismiss for interlocutory appeal under 28 U.S.C. § 1292, which the district court refused to do. USAA here seeks a writ of mandamus directing the district court to dismiss the Waters' case for lack of subject matter jurisdiction.

As we approach the question of issuance of a writ of mandamus, we have some guidance from the Supreme Court and earlier decisions of this court. This court in *Bauman v. United States District Court*, 557 F.2d 650 (1977), the only authority cited by the majority, established the analytical basis for this circuit in approaching writs of mandamus directed to the district courts. The court quoted from *Kerr v. United States District Court*, 426 U.S. 394 (1976), as follows:

> The remedy of mandamus is a drastic one, to be involved only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

Bauman, 557 F.2d at 654 (quoting *Kerr*, 426 U.S. at 402 (citations omitted)).

The *Bauman* court went on to say other cases and authorities bristle with language likewise suggesting that

mandamus will issue only in "drastic," "exceptional," and "extraordinary" circumstances. The *Bauman* court distilled five specific guidelines from Supreme Court and Ninth Circuit jurisprudence to aid in analysis:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to obtain the relief he or she desires;

2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;

3. The district court's order is clearly erroneous as a matter of law;

4. The district court's order is an oft repeated error, or manifests a persistent disregard of the federal rules; and

5. The district court's order raises new and important problems or issues of law of first impression.

Id. at 654-55.

The court then went on to note that its method of analysis does not always compel a particular result:

> Although these guidelines are helpful, they, of course, do not always result in bright-line distinctions. First, the guidelines often raise questions of degree: How clear is it that the lower court's order is wrong as a matter of law? How severe will damage to the petitioner be if extraordinary relief is withheld? Second, rarely, if ever, will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.

Id. at 655.

I will therefore apply the *Bauman* guidelines in my analysis.

1. *No other adequate means.* USAA will no doubt be able to appeal an adverse judgment following the four-day trial scheduled for June. Presumably, but not certainly, it will also be able to appeal any sanctions levied by the district court at the same time or earlier. In due course, some 24 months later, it could expect to receive a decision from this court on the jurisdictional issue. If this is the usual course of a direct appeal, and if a direct appeal is an adequate remedy, then, in this case, USAA is no better or worse off then other parties having to appeal wrong decisions of district courts.

It is by no means a universal rule that the existence of a remedy by appeal operates to automatically limit the use of an extraordinary writ. In *In re State of New York (Petition of Walsh)*, 256 U.S. 490 (1921), the Supreme Court issued an extraordinary writ to prevent the district court from entertaining an action that was barred by the Eleventh Amendment. The Court there emphasized the lack of authority in the district court and said: "The fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset. . . . " *Id.* at 497.

2. *Damage or prejudice not entirely correctable on appeal.* This guideline blurs somewhat into Guideline No. 1, on the adequacy of the appeal as a remedy. (*See Bauman* at 654.) In the situation where the petitioner has pending only the one case which is before the court, then the analysis under *Bauman* might lead to a decision to deny

the writ. However, USAA points out that it is in a somewhat different position. It has 15,000 cases pending nationwide, although undoubtedly only some of those involve cases directly against USAA as opposed to cases against its insureds. Twenty-two of those 172 cases it advances as showing USAA's perfidy were in eight different district courts in the Ninth Circuit, one of which is still pending, in the District of Nevada. With this history of litigation here, USAA has more than an ordinary litigant's interest in the rule pertaining in this circuit.

In addition, USAA is exposed to both the necessity to litigate, and the potential for imposition of sanctions by the district court here for doing no more than legitimately raising an issue relating to the district court's jurisdiction. USAA will be faced with justifying or explaining its position in those 172 cases, dating back to *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974). In addition to the costs associated with the trial itself, the sanctions effort exposes USAA to further fruitless effort since the court has no subject matter jurisdiction. This is an unusual situation for a litigant to find itself in and is an element of prejudice which does not arise in the routine or garden variety struggle over subject matter jurisdiction. For this reason, I believe that the second guideline indicates that USAA is entitled to some relief from this court.

3. *The district court decision is clearly erroneous.* In my view, the district court has either misread or refused to apply controlling Supreme Court and Ninth Circuit precedent on the issue of diversity jurisdiction over unincorporated associations. We need look no further than the recent Supreme Court case of *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), to

learn all we need to know about the current state of the law on this issue. *Carden* stands for the proposition that the status of an entity under state law controls, with noncorporate entities having the residence of each of its members. That case involved a limited partnership organized under the law of Arizona which filed a diversity action in federal court in Louisiana. The defendants contested jurisdiction on the ground that one of the partnership's limited partners was a citizen of Louisiana. After trial, in which the partnership prevailed, the defendants succeeded in attracting the attention of the Supreme Court. The Supreme Court reviewed the state of its jurisprudence concerning the treatment of noncorporate business organizations. The Court there said: "While the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have (with an exception to be discussed presently) just as firmly resisted extending that treatment to other entities."

The one exception the Supreme Court pointed to was *People of Puerto Rico v. Russell & Co., Sucesores S.En.C.*, 288 U.S. 476 (1933), which held that an entity created under the civil law of Puerto Rico could be treated as a citizen of Puerto Rico for diversity purposes, even though it was not a corporation. In *Carden* Arkoma argued that the existence of the *Russell* case and the language used therein,

> reflect the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship.

The Supreme Court rejected this contention by Arkoma, saying:

> The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in [*United Steelworkers of America*, AFL-CIO v. R.H. Bouligny, Inc. 382 U.S. 145 (1965)] . . . There could be no doubt, after *Bouligny*, that at least common-law entitles (and likely all entities beyond the Puerto Rican sociedad en commandite) would be treated for purposes of the diversity statute pursuant to what Russell called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships."

Id. at 1018.

Thus, after *Carden*, the only inquiry to be made is whether or not the entity is or is not a corporation.

In the face of this authority, the district court reviewed the status of USAA pursuant to the *Russell* exception, stating the question before it was whether "USAA has sufficient corporate traits to be within the *societe en commandite's* corporate boundaries." After noting that USAA is a statutory entity governed by very specific Texas insurance laws, and that federal laws treat USAA in a corporate manner for a variety of purposes, the court considered USAA to have sufficient corporate traits to come within the *Russell* analysis. Even after looking at *Carden* and *Bouligny*, the court nevertheless stated that "*Carden* makes it clear that *Russell* still has precedential value," and that *Russell*'s functional approach in determining an entity's jurisdictional status

"must be considered in any analysis of an association as a juridical person." The district court followed this analysis in the face of the Supreme Court's specific rejection of this very argument in *Arkoma*, as quoted above.

The district court also noted the existence of a Second Circuit case (*Baer*) and a Tenth Circuit case (*Tuck*) both specifically involving USAA and both specifically holding that USAA was to be considered a citizen of each and every state in which it has members.[1] However, the district court tried to distinguish these cases on the grounds that they were pre-*Carden*, relied on *Bouligny*, and did not discuss *Russell*.

This dismissal of *Carden* and *Bouligny*, not to mention *Baer* and *Tuck*, is simply insupportable. The question before the district court was whether USAA was a corporation under the laws of Texas, not whether it has sufficient corporate-like traits to be treated as a corporation.

Waters assert here a basis of decision which the district court did not rely on, although Waters urged it there also. Waters contend that Texas has amended its statutes to turn unincorporated associations into corporations. This contention has no merit. Reciprocal and interinsurance exchanges are organized under Chapter 19 of the Texas Insurance Code. Article 19.12 exempts reciprocal or interinsurance exchanges from all insurance laws of the State of Texas, except those specifically mentioned in that

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[1] *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974); *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). The *Baer* case specifically analyzed the status of USAA under Texas law, and concluded that it was not a corporation. The *Tuck* case agreed.

section or in other statutes specifically mentioning exchanges.

The 1987 Act relied on by Waters (Ch. 424, Acts 1987, 70th Leg.) defines as a corporation, for the purpose of the Miscellaneous Insurance Laws, any corporation organized under specified acts, including the Insurance Code. The 1987 Act was passed to permit the shareholders of corporations as defined therein, which included some unincorporated associations, to amend the articles to exclude liability of its directors to the shareholders or members for acts or omissions as directors, with some exceptions.

The *Baer* court examined the Texas insurance statutes and concluded that USAA, as an exchange, was not a corporation. Examination of Chapter 19 of the Texas Insurance Code demonstrates that exchanges are still not corporations at all, so they can not be corporations organized under the Insurance Code, within the meaning of Ch. 424.

If there was any doubt about the inapplicability of the 1987 Act, it was laid to rest by another act passed by the Texas legislature in 1987. Chapter 639, effective on the same date as Chapter 424, is codified as Article 19.13 of the Insurance Code, and provides:

> The provisions of the Texas Business Corporations Act relating to the indemnification of officers and directors apply to and govern reciprocal or interinsurance exchanges organized under this Chapter [which relates to exchanges].

Article 1302-1.03A of the Miscellaneous Corporations Laws Act provides:

> All corporations shall, to the extent not inconsistent with any special statute pertaining to a particular corporation, be governed:
>
> (1) by the Texas Business Corporations Act, as amended, if organized for profit, and
>
> (2) by the Texas Non-Profit Corporation Act, as amended, if organized not for profit.

If exchanges were indeed corporations, by virtue of Section 424, then Section 639 was not needed, as exchanges would have already been governed by the Texas Business Corporations Act, pursuant to the operation of Article 1302-1.03a.

A reciprocal or interinsurance exchange is not a corporation under Texas law. The statutes make that abundantly clear, and case law from the courts of Texas also supports this conclusion. *See, e.g., Highway Ins. Underwriters v. Reed*, 221 S.W.2d 925 (Tex. Civ. App. 1949). Chapter 424 did not change the status of exchanges, and they are still not corporations.

4. *Oft repeated error or persistent disregard of federal rules.* This fourth factor does not, by its terms, apply here.

5. *The district court's order raises new and important problems or issues of law of first impression.* At first glance, the decision of the court below does not raise any issues of law of first impression. The *Carden* rule seems clear enough.

The district court has decided, though, that a functional analysis of corporate-like traits is still possible after

Carden. This limited view is contrary to that of every federal court which has considered the effect of *Carden*.

A decision by this court now will impact the case now pending in the Central District, as well as the one pending in Nevada. USAA is not the only reciprocal or interinsurance exchange doing business in the Ninth Circuit, so the potential for other litigants plus USAA to face diversity questions relating to these entities is very real. In this sense, the district court raises important new issues for litigants and the federal courts.

If this were an ordinary insurance bad faith case, a writ of mandamus would perhaps not be appropriate. Here, however, we have an insurer with an inventory of 15,000 cases nationwide, and a history of being heavily involved in first-party disputes with its insureds. This case load, and exposure to conflicting results in other cases might not, by itself, tip the balance sufficiently to trigger a writ. But Waters have shown themselves to be determined opponents. They appear intent on not only vindicating their own wrongs, but in the process, cleaning up USAA's act by seeking $1.72 million in sanctions for its conduct in dozens of other cases unrelated to theirs.

USAA may need a cathartic experience such as Waters intend to give it. The propriety of any such sanctions is not before us. Since the district court lacks jurisdiction, and USAA's motion did no more than point that out, the propriety of sanctions is not for that court, either. What USAA does not need is to undergo the ordeal it faces in a court without subject matter jurisdiction. The district court does not need to expend its efforts and the

parties' time and money in pursuing a case which is so clearly outside its authority.

If the lack of jurisdiction in the district court were not so apparent, the other problems faced by USAA would not be sufficient to justify mandamus. When all these factors are weighed, we have "exceptional circumstances amounting to a judicial usurpation of power." *Kerr*, 426 U.S. at 402.

In deciding to issue a writ rather than let the case proceed in the ordinary manner, the Supreme Court said in *In re State of New York (Petition of Walsh)*:

> The want of authority in the District Court to entertain these proceedings . . . is so clear, and the fact that the proceedings are in essence suits against the State without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile results, the writ of prohibition should issue as prayed.

Id., 256 U.S. 490, 502 (1921).

For the reasons stated above, I believe that USAA has stated not only a justiciable claim for extraordinary relief by mandamus, it has stated a compelling case for our doing so. The inevitably futile result which will follow months from now dictates that we rule on the jurisdictional issue at this point, rather than many months and much labor from now. I therefore dissent from the denial of the Petition for Writ of Mandamus.

EXHIBIT A

No. 90-5009
No. 90-5022

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEROY TUCK, Administrator of the
Estate of JOHNNY L. TUCK, Deceased;
LEROY TUCK, an Individual, and
DOROTHY TUCK, an Individual,
Plaintiffs/Appellees,

vs.

ROBERT F. McDERMOTT, as the Class Representative
of the diverse Subscribers of
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendant/Appellant,

and

UNITED SERVICES AUTOMOBILE ASSOCIATION,
An Unincorporated Association,

Defendant/Appellant.

REPORT ON MEASURES UNDERTAKEN
TO INSURE THAT UNITED SERVICES AUTOMOBILE
ASSOCIATION, AS AN ENTITY, WILL NOT BE
A PARTY IN FEDERAL COURT ACTIONS BASED ON
DIVERSITY OF CITIZENSHIP

On Appeal from the United States District Court
for the Northern District of Oklahoma
Case No. 83-C-175 C
The Honorable H. Dale Cook, District Judge

Timothy B. Dyk
Robert H. Klonoff

JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel For Defendant-Appellant United Services Automobile Association

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INTRODUCTION

On November 16, 1990, the parties in these cases reached a complete settlement of all pending matters. United Services Automobile Association ("USAA") agreed to pay the plaintiff-appellees the amount of the judgment in this case, including accrued interest – *i.e.*, $1,396,063.85 (plus $448.29 per day additional between November 20, 1990, and the date of payment). The parties agreed to file a joint motion seeking dismissal of all pending matters, and USAA's payment to plaintiff-appellees was to take place promptly upon this Court's granting of the Joint Motion. That Joint Motion was filed with this Court on November 23, 1990.

In the Joint Motion, the parties noted that, while not required by the settlement agreement, USAA wished to address the issues raised in plaintiff-appellees' October 25, 1990, Motion to Impose Sanctions Against USAA in No. 90-5009. In that motion plaintiff asserted, *inter alia*, that after this Court's decision in *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989), holding that USAA could not appear as a party in diversity cases, USAA continued to appear in federal court in 22 cases. USAA undertook to file the report with the Court by December 10, 1990.

This report advises the Court of the steps that USAA has taken, and is continuing to take, to insure that USAA, as an entity, will not be a party to actions in federal courts based on diversity of citizenship.

Part I describes the efforts taken by USAA at about the time of this Court's original decision in *Tuck* to notify its personnel that USAA, as an entity, is not subject to

federal jurisdiction based on diversity. Part II discusses the 22 post-*Tuck* cases cited by plaintiff-appellees as involving USAA as a party in federal court diversity litigation. Finally, Part III examines recent efforts by USAA to prevent the problem from arising again in the future.

I. STEPS TAKEN AT THE TIME OF *TUCK* TO AVOID USAA'S APPEARANCE AS AN ENTITY IN FEDERAL COURT BASED ON DIVERSITY OF CITIZENSHIP

On May 2, 1988, after the Tenth Circuit had been advised of the diversity problem in *Tuck*, USAA advised its personnel to avoid diversity actions in federal court. Specifically, USAA sent a bulletin to all regional claims officials (*i.e.*, senior claims attorneys, supervisors of litigation, regional claims management, and casualty file handlers) in the various USAA offices[1] advising them of the diversity issue. Citing the Second Circuit's decision in *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974), the bulletin explained that USAA, as an unincorporated association, was a citizen for diversity purposes of every state in

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[1] Although USAA's headquarters and two regional offices are in San Antonio, Texas, most of its litigation is handled out of its offices in Sacramento, California; Colorado Springs, Colorado; Tampa, Florida; Norfolk, Virginia; Reston, Virginia; and Seattle, Washington. Each office has various claims management officials, including an assistant vice president. There is also a supervising attorney in each office. The supervising attorney is assisted by litigation supervisors (and, below them, by numerous file handlers). These individuals supervise lawsuits handled by both USAA staff counsel and outside counsel.

which it has members. The bulletin then instructed as follows:

> [I]n any federal action in which USAA is named as a defendant and the jurisdictional basis of the action is diversity, claims personnel should take appropriate action to seek dismissal based on the lack of diversity. This ruling applies only to USAA and not to any other company in the USAA structure. . . . [2]

On October 14, 1988, this Court held in *Tuck* that USAA, as an entity, could not appear as a party in federal court based on diversity of citizenship. The Court reasoned that because USAA is a reciprocal exchange, it must be treated as a citizen of every state in which it has members.[3] The Court noted that because USAA has "asked us to dismiss this action for lack of subject matter jurisdiction, we expect it to make similar motions in all pending diversity litigation." 859 F.2d at 845 n.3.

On December 12, 1988, USAA sent a second memorandum to all senior claims attorneys, supervisors of litigation, and San Antonio claims counsel staff. That memorandum stated that in addition to the Second Circuit's decision in *Baer*, the principle that USAA, as an

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[2] There are several entities in the USAA structure, such as USAA Casualty Insurance Company, which are Texas corporations rather than unincorporated associations, and which therefore are not subject to the reasoning in *Baer* and *Tuck*.

[3] The correctness of this Court's reasoning was affirmed on February 27, 1990, by the Supreme Court. *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990) (holding that for purposes of diversity, a limited partnership is a citizen of every state in which a general or limited partner resides).

entity, cannot sue in federal court based on diversity of citizenship was established by this Court's *Tuck* decision. The memorandum indicated that each recipient "need[s] to review the *Tuck* decision. The court is very strong on its position regarding USAA litigating in Federal Court. The message is clear, stay out of Federal Court." The memorandum added that "all future cases will be handled in accordance with the *Baer* decision and the *Tuck* decision," and it instructed all recipients to "[m]ake sure that the file handlers in your area are aware of this law and the policy regarding our use of the Federal Court system."

On May 10, 1989, USAA conducted a legal conference for senior claims attorneys, supervisors of litigation, and regional claims management personnel. One of the topics was "USAA as a defendant in federal court." The discussion centered on *Baer* and *Tuck* and the need to recognize that USAA, as an entity, cannot sue or be sued in federal court based on diversity of citizenship.

II. POST-*TUCK* FEDERAL DIVERSITY CASES INVOLVING USAA

Notwithstanding USAA's efforts to advise the USAA staff about *Baer* and *Tuck* and the need to avoid diversity litigation when USAA as an entity is involved, a small number of the approximately 15,500 cases in USAA's litigation docket were cases brought by or against USAA based on diversity of citizenship that were either filed after *Tuck* or, although initially filed prior to *Tuck*, remained open subsequent to that decision. This apparently occurred in large part because the previous notices

to USAA's own staff were not transmitted directly to USAA's local outside counsel and in part because some USAA staff members did not implement USAA's policy as carefully as they should have.

In their Motion to Impose Sanctions Against USAA, appellees cite 22 such cases. Some of those 22 cases reflect no departure from USAA's policy or this Court's admonition in *Tuck*. Thus, one of the 22 cases, *Porter v. USAA, d/b/a USAA Casualty Insurance Company*, No. CV-88-PT-0286-S (N.D. Ala. dismissed Dec. 14, 1988) (Appellees' Case No. 20), involved a policy written by one of USAA's corporate subsidiaries, USAA Casualty Insurance Company, and thus raised no issue of improper diversity. *See* note 2, *supra*. Moreover, in seven of the 22 cases, USAA, after being named as a party in federal court based on its alleged status as a Texas citizen, promptly called the jurisdictional issue to the court's attention.[4]

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[4] *Pacific Int'l Servs. Corp. v. Kaji*, No. 89-00074-ACK (D. Hawaii) (Case No. 5) (complaint filed 1/31/89; USAA's motion to intervene, which noted jurisdictional issue, filed 3/24/89 and granted 4/25/89; USAA's answer, which asserted lack of diversity and subject matter jurisdiction, filed 6/6/89; stipulated dismissal filed 11/21/89); *Herrmann v. USAA*, No. SA-87-CA-0316 (W.D. Tex) (Case No. 13) (complaint filed 3/29/88; USAA's answer, which asserted lack of diversity and subject matter jurisdiction, filed 4/7/88; USAA's motion to dismiss for want of subject matter jurisdiction filed 3/22/89 and granted 4/5/89); *USAA v. Jelks*, No. 88-58-CIV-2 (E.D.N.C.) (Case No. 14) (USAA's state court complaint filed 10/12/88; defendant's removal petition filed 10/24/88; USAA's reply to counterclaim, which noted lack of diversity and subject matter jurisdiction, filed 11/28/88; USAA's motion to remand filed 1/19/89 and

(Continued on following page)

Of the remaining cases cited by appellees, only two are still pending in federal court: *USAA v. Arey*, No. 89-0139-A (W.D. Va.) (Appellees' Case No. 1), and *Insurance Co. of the State of Pennsylvania v. Pacific Engineering & Prod. Co. of Nevada, Inc.*, No. CV-S-89-380-PMP (D. Nev.) (Appellees' Case No. 2). In both of those cases, USAA has filed motions to dismiss on the ground that the court lacks subject-matter jurisdiction over USAA.

III. OTHER RECENT EFFORTS TO CORRECT THE DIVERSITY PROBLEM

In the past several months, USAA has undertaken numerous other steps to correct the diversity problem. These include the following:

First, on September 6, 1990, USAA sent a memorandum addressing the issue to all senior claims attorneys,

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granted 3/16/89); *Dennis v. USAA*, No. CIV-88-2045-A (W.D. Okla.) (Case No. 16) (complaint filed 11/17/88; USAA's motion to dismiss, which asserted a lack of diversity and subject matter jurisdiction, filed 1/3/89; joint dismissal filed 1/20/89); *Lovelace v. USAA*, No. CIV-88-1236-P (W.D. Okla.) (Case No. 17) (complaint filed 7/22/88; USAA's suggestion of lack of subject matter jurisdiction and motion to dismiss filed 8/18/88 and granted 11/23/88); *Hartford Casualty Ins. Co. v. Kennedy*, No. 88-CIV-250 (N.D. Ga.) (Case No. 18) (complaint filed 2/5/88; USAA's answer, which asserted a lack of diversity and subject matter jurisdiction, filed 6/3/88; consent judgment entered 1/24/89); *O'Brien v. USAA Properties II, Inc.*, No. 88-CIV-1124 (N.D. Ga.) (Case No. 22) (complaint filed 5/23/88; USAA substituted as proper party defendant 7/12/88; USAA's motion to dismiss for lack of subject matter jurisdiction filed 8/12/88 and granted 10/19/88).

claims attorneys, supervisors of litigation, regional claims management, and casualty file handlers. The memorandum provided a detailed discussion of this Court's *Tuck* decision and noted that "[t]he court was extremely agitated at USAA's delay in pointing out the jurisdictional problem and directed the District Court to consider sanctions against USAA." The memorandum concluded:

> All claim handlers who are involved in litigation are reminded that USAA should appear neither as a plaintiff nor defendant in federal court when diversity is the jurisdictional basis.
>
> USAA CIC and USAA GIC are not reciprocals and federal court actions based on diversity are permissible when one of these entities is a named party.

Second, on November 8, 1990, USAA's Senior Vice President and General Counsel sent a memorandum to all of USAA's approximately 3,200 outside counsel. The letter advised these attorneys that:

> *Under no circumstances should any case involving USAA be commenced in defended in or removed to federal court on the basis of diversity jurisdiction.* (Emphasis in original).

Counsel were asked to identify any additional pending federal court case for which they are responsible involving USAA as a party based on diversity of citizenship. On November 15, 1990, USAA sent a similar memorandum to all litigation supervisors, claims attorneys, and senior claims attorneys containing the same italicized warning and requesting immediate identification of any cases improperly pending in federal court. As a result of those memoranda USAA has identified three additional cases

in federal court in which USAA as an entity is the named party.[5] Dismissals have been sought in two of these cases; in the third, USAA has yet to be served, but plans to seek dismissal as soon as service is effected. If other cases are reported, they will also be dismissed or other appropriate action will be taken.

Fourth, on November 14, 1990, USAA's Vice President and Claims Counsel sent to all of USAA's outside counsel and USAA staff counsel an attachment to be included in the USAA Litigation Manual (the "Manual").[6] The attachment explains the diversity problem with respect to USAA and states the following:

> If an action is filed in federal court based on diversity, it is USAA's policy to actively seek dismissal. Likewise we should never file any suits in federal court based on diversity.

The attachment will be made a permanent part of the Manual when it is revised within 90 days.

Fifth, on November 20, 1990, USAA added a notice to its "transmittal memorandum," a document that USAA requires to accompany every new case file sent to local

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[5] These cases are in the Western District of Kentucky, the Southern District of Florida, and the Western District of Louisiana

[6] The Manual contains procedures and policies for all attorneys representing USAA in claims matters. It is distributed to all USAA in-house counsel, staff attorneys, and file handlers as well as all outside counsel representing USAA.

counsel, which states in block letters: "USAA, A RECIPROCAL INTERINSURANCE EXCHANGE, AS AN ENTITY, IS NOT SUBJECT TO FEDERAL DIVERSITY JURISDICTION IN ANY OF THE FEDERAL DISTRICTS. SEE USAA LITIGATION MANUAL FOR FURTHER DETAILS."

Finally, USAA is currently updating its computer system for tracking cases in federal court. Information regarding USAA's court docket has been computerized only for the past two years. Even during that time, the information has not been complete because claims personnel have sometimes failed to enter pertinent information, such as the court in which a particular case is pending. USAA is now exploring the purchase of a major computer software system which, when fully operable, will better enable the company to track all pending court cases. By reviewing this information on a regular basis, USAA should be able to identify any case which has been improperly filed against USAA as a defendant in a diversity action. Corrective action can then be taken immediately.

USAA regrets that even after *Tuck,* diversity cases involving USAA as an entity were brought or remained in federal court. However, USAA believes that the above

steps, taken together, should effectively eliminate this problem in the future.

Respectfully submitted,

/s/ Timothy B. Dyk
Timothy B. Dyk
Robert H. Klonoff

JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005

Counsel for Defendant-Appellant United Services Automobile Association

Dated: December 10, 1990

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 1801 Century Park East, Ninth Floor, Los Angeles, California 90067.

On October 28, 1991, I served the foregoing document described as **DECLARATION OF TIMOTHY B. DYK IN SUPPORT OF REPLY MEMORANDUM TO OPPOSITION TO MOTION TO DISMISS AND REQUEST FOR SANCTIONS** on the interested parties in

this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

William M. Shernoff
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

I deposited such envelope(s) in the mail to Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on October 28, 1991, at Los Angeles, California.

/s/ Shirley Kadomoto
Shirley Kadomoto

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 JSL(GHKY) COMPLAINT AND DEMAND FOR JURY TRIAL 1. Breach of Duty of Good Faith and Fair Dealing (Filed Jul. 5, 1991)

Plaintiffs allege as follows:

GENERAL ALLEGATIONS

1. Plaintiffs, LAUGHLIN E. WATERS and VOULA D. WATERS ("WATERS"), are, and at all times herein mentioned were, residents and citizens of the State of California, City of Los Angeles.

2. Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), is, and at all times herein mentioned was a domestic reciprocal insurance company with its principal place of business in the State of Texas.

3. This court has original jurisdiction under 28 USC Section 1332 in that this is a civil action between citizens of different states in which the matter in controversy exceeds, exclusive of costs and interest, fifty thousand dollars ($50,000).

4. On or about August 18, 1989 plaintiffs' property at 112 North June Street, Los Angeles, California ("residence") was appraised by Chubb Group of Insurance Companies. At that time, the estimate of the current cost of reconstruction was $1,607,000.

5. On or about July, 15, 1990 USAA issued Homeowners Policy number 165 45 98 92A ("the Policy") to plaintiffs to cover the residence from July 15, 1990 to July 15, 1991. A copy of the Policy is attached hereto as Exhibit "A". The Policy provided, among other things, that if plaintiffs' residence was damaged by fire, then USAA would pay benefits to plaintiffs for the damages they sustained as a result of the fire, including damages to their dwelling, personal property, and damages for loss of use incurred as a result of the fire. The Policy was entered into by plaintiffs within the jurisdiction of the above-entitled court and required payment of benefits to plaintiffs within the jurisdiction of the above-entitled court for a total amount to be shown at the time of trial.

6. The Policy was purchased by plaintiffs in the reasonable expectation that it would provide coverage for claims relating to plaintiffs' home, including claims due

to fire loss and that defendant would deal with plaintiffs fairly, equitably, in good faith and in full conformity with the expressed and implied terms of the Policy. This expectation was brought about and intended by defendant as a result of the contractual language in the Policy and by the express representations of the respective employees, agents and representatives of defendant.

7. The Policy provided the following limits of liability: Dwelling – $1,615,000; Private Structures – $161,500; Personal Property – $1,615,000; Loss of Use – $323,000.

8. Plaintiffs have paid all premiums due under the Policy to USAA at all relevant times herein, have performed all obligations under the Policy on plaintiffs' part to be performed and have otherwise acted at all times in full conformity with their obligations under the Policy.

9. On or about December 17, 1990 plaintiffs' residence was extensively damaged due to fire. As coverage provided through the Policy extended through July 15, 1991, the Policy was in full force and effect at the time the fire occurred.

10. Plaintiffs timely notified USAA of the loss suffered as a result of the fire.

11. On or about December 17, 1990 USAA informed plaintiffs that their claim had been assigned to Kevin Bushaw ("Bushaw"), General Adjuster, and stated that plaintiffs could use the contractor of their choice. Plaintiffs chose TMLC Construction Services Co. (TMLC), whose initial bid, excluding prior emergency work and

any contingency funds, was $381,276.00. Due to the discovery of additional damage and the determination that certain damaged items had to be replaced rather than repaired, TMLC's bid was later readjusted to $442,663.35, excluding prior emergency repairs and any contingency funds. However, by its subsequent actions, as detailed below, it is apparent that USAA never had any intention on allowing plaintiffs' to use a contractor of their choice, but, rather, a company hand picked by USAA.

12. The day after the fire, Bushaw recommended to USAA that reserves of $500,000 for the restoration of the house and contents and $75,000 for living expenses be established. Bushaw has admitted that he was unaware of what was in the house when the reserves were established, and that the reserve amounts were too low. USAA has shown by their conduct that they did not intend to increase their reserve amounts, or settle the claim for more than the established reserve amounts.

13. On or about December 20, 1990 USAA initiated an estimating process which subsequently revealed a pattern of low bidding, and a time consuming approach which has subjected plaintiffs to unreasonable delay and harassment. The following briefly outlines USAA's low bidding pattern:

a. USAA CompuClaim estimate dated December 20, 1990 in the amount of $116,587.85;

b. The revised USAA CompuClaim estimate of January, 1991 in the amount of $160,460.35;

c. Clark-Porsche Construction Company estimate dated February 15, 1991 in the amount of $223,859.36;

d. Clark-Porsche Construction Company estimate dated March 5, 1991 for $251,407.28;

e. Clark-Porsche Construction Company revised March 5, 1991 estimate of $258,513.28;

f. Clark-Porsche Construction Company revised March 5, 1991 estimate of $287,589.60;

g. Clark-Porsche Construction Company estimate dated May 24, 1991 in the amount of $301,019.38;

h. Clark-Porsche Construction Company revised May 24, 1991 estimate of $319,019.38.

14. The CompuClaim estimates which were offered to plaintiffs by USAA were meaningless as USAA is not in the business of home restoration, and no construction contractor had agreed to repair the structure for either amount. After retaining the services of Clark-Porsche Construction Co., Inc. ("Clark-Porsche"), a construction company whose livelihood depends almost entirely upon the insurance industry, USAA continued the "lowbid" estimating approach. Presently, despite the extensive six and one half month delay in adjusting this claim, defendant's estimate is still substantially less than that required to adequately repair or replace the damaged property with like kind and quality materials and workmanship.

15. An example of defendant's estimating process is contained in Clark-Porsche's initial $223,859.36 estimate of February 15, 1991. That estimate included a notation

that no guarantee could be given on the roof repairs, did not specify the contemplated restoration work and failed to identify the type and quality of materials that Clark-Porsche used in making its estimate. As plaintiffs' residence contained numerous special items, including, but not limited to, elaborately milled, solid, mahogany doors finished in antique red stain and gold leaf edging, it was of utmost concern to plaintiffs that replacement be sufficient to provide restoration workmanship and materials consistent with the quality of the original residential construction. Clark-Porsche's failure to specify the particulars of replacement and repair, and USAA's failure to inquire or investigate the numerous special items at plaintiffs' residence did not meet the Policy's provisions nor did it meet plaintiffs' expectations as to coverage under the Policy. However, this did not prevent USAA from demanding that plaintiffs accept this initial estimate as the true cost of restoration.

16. On or about March 11, 1991 plaintiffs met with Bushaw to discuss the low bid proposal of USAA's fire restoration company, Clark-Porsche. Instead of providing a comprehensive description of the actual work that Clark-Porsche would perform and a statement of the materials to be used, Bushaw demanded that plaintiffs' contractor match the lower, unsubstantiated, incomplete and inadequate figures of Clark-Porsche.

17. From the time the huge restoration differences appeared in TMLC's and Clark-Porsche's proposals, USAA constantly insisted that TMLC justify and reevaluate their bids and make their estimates available to USAA. But, USAA would not reciprocate by providing plaintiffs a complete Clark-Porsche estimate. This is

despite repeated requests by plaintiffs to explain how proper restoration could be accomplished at this proposed bargain basement price. These repeated requests by plaintiffs were necessitated by obviously erroneous aspects of the estimate such as the amounts allocated to cabinets and carpentry. Another example was the antique silver Waterford chandelier, with an estimated value range of $18,000 to $24,000, which Clark-Porsche had listed at $3,500. According to Bushaw, the $3,500 price was established by counting the number of tiers that were left from a picture of the remains, even though most of the fixture was gone.

18. According to the provisions of the Policy, USAA agreed to pay the reasonable cost incurred for necessary measures taken solely to protect against further damage. At the request of plaintiffs, TMLC took appropriate measures to guard against vandalism and to minimize the loss until the contents of the residence could be removed. A $14,004 bill for these services was submitted to USAA. Initially, USAA refused to pay this covered expense. During the March 11, 1991 meeting, after having been told that TMLC might file a lien against the property for these expenditures, USAA finally agreed to pay $13,845.93, approximately 3 months after incurring this expense.

19. Plaintiffs and TMLC continued to cooperate with defendant by providing complete and detailed information regarding the nature and scope of the repairs that were necessary to recapture the pre fire quality of plaintiffs' residence. USAA then had no alternative but to reluctantly increase its estimate to match the substantial evidence plaintiffs submitted.

20. However, as Clark-Porsche's proposal still did not provide the full extent of benefits required under the Policy, on or about April 1, 1991 plaintiffs wrote to Ray Roe, a Property Specialist at USAA, whom plaintiffs believed would make the final determination. Plaintiffs requested written statements of all the benefits which USAA intended to provide for restoration and reconstruction of the residence; living expenses to be provided; restoration and reconditioning of the contents including requirements concerning purchasing and replacement of destroyed items; and specification of restoration work and materials contemplated under USAA's most recent proposal.

21. Plaintiffs wrote to Bushaw on or about April 2, 1991 regarding the fair rental value of their home. At USAA's request, plaintiffs had, in December, 1990 obtained three separate statements regarding the amount of fair rental value, and had timely submitted them to USAA. USAA did not, until February, 1991, verbally agree upon the amount of $11,083 per month. During the March 11, 1991 meeting with plaintiffs, Bushaw wanted plaintiffs to enter into an agreement limiting the length of time for payment of the fair rental value, thereby denying them the full amount of benefits to which they were entitled under the Policy provisions. Plaintiffs refused, and as of the April 2, 1991 letter, approximately four months after the fire, defendant still had failed to provide a written confirmation of the agreed amount and had failed to advise how and when the fair rental value payment would be made, despite numerous requests by plaintiffs. According to Bushaw, he had not submitted any living expenses for payment as USAA wanted a

package proposal submitted even though this procedure worked an undue hardship on plaintiffs by delaying benefit payments.

22. On or about April 11, 1991 plaintiffs met with Bushaw and Bill Hooper, of USAA's Home Office. During that meeting Hooper spent almost two hours trying to force Clark-Porsche's bid upon plaintiffs. Bushaw threatened to take over the construction and have defendant do the work in an effort to make plaintiffs accept the low Clark-Porsche bid. Plaintiffs refused the offer and requested a copy of the claim file during this meeting and were informed that the only documents in the claim file were a three column worksheet, Clark-Porsche's proposal and TMLC's proposal. There were notes submitted by Bushaw, however USAA declined to produce these, stating that they were work product.

23. On or about May 30, 1991 defendant, by and through Bushaw, having already delayed repair of the property for approximately five and a half months, finally offered their package proposal which attempted to compromise plaintiffs' claim for less than the Policy benefits to which plaintiffs are entitled, as evidenced by, but not limited to, the following:

(a) The revised complete and final repair estimate submitted by Clark-Porsche was $319,019.38, far less than the repair estimate of $442,663.35 obtained by plaintiffs, and certainly not sufficient to return plaintiffs' dwelling to its pre fire condition.

(b) Defendant intentionally misrepresented Policy provisions by categorizing the "hold back" money as depreciation. The Policy clearly states that under the full

replacement cost coverage depreciation will not be deducted.

(c) Defendant has arbitrarily established the Fair Rental Value to be limited to nine months. USAA's May proposal is totally unrealistic as the Policy does not contain any time limitations other than that it be reasonable. Due to defendant's unreasonable delay and lowbid estimating patterns, this nine month proposal demonstrates USAA's lack of good faith and fair dealing. USAA's May proposal allows only two and one half months to accomplish complete restoration of plaintiffs' residence, assuming repairs were initiated immediately.

(d) Erroneously including drapery under the dwelling reconstruction cost instead of personal property, when the Policy is silent with respect to drapery classification.

PLAINTIFFS, LAUGHLIN E. WATERS and VOULA D. WATERS, FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION, FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING, ALLEGE:

24. Plaintiffs refer to each and every paragraph contained in the General Allegations and incorporates those paragraphs as though set forth in full in this cause of action.

25. Defendant, USAA, has breached its duty of good faith and fair dealing owed to plaintiffs in the following respects:

(a) Unreasonably and in bad faith telling plaintiffs that they could use the contractor of their choice and then applying relentless pressure upon plaintiffs to use USAA's handpicked company, Clark-Porsche; offering plaintiffs a total money settlement of plaintiffs' fire loss which was based on defendant's knowing, deliberate and improper interpretation and application of Policy provisions regarding depreciation, fair rental value, and time restrictions or limitations; and, deliberately and wrongfully apportioning part of the settlement offer under incorrect Policy coverages in amounts which defendant knew to be substantially less than the amounts to which plaintiffs were and are entitled to under the terms of the Policy.

(b) Unreasonably delaying payments to plaintiffs in bad faith knowing plaintiffs' claim for benefits under the policy to be valid in an attempt to coerce plaintiffs' into accepting a repair proposal by USAA's fire restoration company that was substantially less than that required to repair or replace the damaged property.

(c) Unreasonably misrepresenting to plaintiffs pertinent insurance policy provisions relating to the coverage in issue by categorizing the "hold back" money as depreciation, when the Policy clearly states that under the full replacement cost coverage depreciation will not be deducted; and by limiting the period of time for payment of the Fair Rental Value when the specific Policy provisions did not so restrictively limit the payment.

(d) Failing to reasonably investigate and process plaintiff's claim as had USAA adequately investigated the proposal by its contractor, Clark-Porsche, it

would have determined that the bid did not state the proper value for restoration of plaintiffs' property, as evidenced by, but not limited to, the attempt to place a price of $3,500 on an antique silver Waterford chandelier valued at between $18,000 and $24,000, nor did it adequately provide the full extent of benefits due under the Policy.

(e) Unreasonably and in bad faith attempting to induce plaintiffs to settle or compromise their claim for less than the amount to which plaintiffs were reasonably entitled, in that defendant withheld sums due and owing to plaintiffs, knowing that withholding such sums would impair and jeopardize plaintiffs' financial situation, and thus coerce plaintiffs to settle their claim for a sum less than they were reasonably entitled to under the Policy.

(f) Not attempting in good faith to effectuate a prompt, fair and equitable settlement of plaintiffs' claim for benefits in which liability has become reasonably clear for the reasons set forth in subsections (a), (b), (c), (d) and (e) above.

26. As a proximate result of the aforementioned unreasonable and bad faith conduct of defendant, plaintiffs have suffered, and will continue to suffer in the future, damages under the Policy, plus interest, and other economic and consequential damages, for a total amount to be shown at the time of trial.

27. As a further proximate result of the aforementioned wrongful conduct of defendant, plaintiffs have suffered anxiety, worry, mental and emotional distress, all to plaintiffs' general damage in a sum to be determined at the time of trial.

28. As a further proximate result of the unreasonable and bad faith conduct of defendant, plaintiffs were compelled to retain legal counsel to obtain the benefits due under the Policy. Therefore, defendant is liable to plaintiffs for those attorneys' fees reasonably necessary and incurred by plaintiffs in order to obtain the Policy benefits in a sum to be determined at trial.

29. Defendant's conduct described herein was intended by the defendant to cause injury to plaintiffs or was despicable conduct carried on by the defendant with a willful and conscious disregard of the rights of plaintiffs, subjected plaintiffs to cruel and unjust hardship in conscious disregard of plaintiffs' rights, and was an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention to deprive plaintiff of property, legal rights or to otherwise cause injury, such as to constitute malice, oppression or fraud under California Civil Code section 3294, thereby entitling plaintiffs to punitive damages in an amount appropriate to punish or set an example of defendant.

WHEREFORE, plaintiffs pray for judgment against defendant as follows:

1. Damages for failure to provide benefits under the policy, plus interest, including prejudgment interest, and other economic and consequential damages, in a sum to be determined at the time of trial;

2. General damages for mental and emotional distress in a sum to be determined at the time of trial;

3. For attorney's fees incurred by plaintiffs to obtain the policy benefits in an amount to be determined at trial;

4. Punitive and exemplary damages in an amount appropriate to punish or set an example of defendant;

5. For costs of suit incurred herein; and

6. For such other and further relief as the Court deems just and proper.

Dated this 5 day of July 1991, at Claremont, California.

SHERNOFF, BIDART
& DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF
Attorneys for Plaintiffs

JURY DEMAND

Plaintiff hereby demands a trial by jury.

SHERNOFF, BIDART
& DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF

EXHIBIT A

USAA 165 45 98 92A

LAUGHLIN E WATERS
CPT USA RET
112 NORTH JUNE STREET
LOS ANGELES CA 90004-1040

HOMEOWNERS
INDEX OF PACKET CONTENTS

Your insurance package is separated into two distinct categories. CATEGORY I contains policy specifications, coverages, conditions, and exclusions. CATEGORY II (if applicable) contains additional, important information that is not a part of your policy, but should be read carefully and then kept with your policy papers. NOTE: Any premium charge or return will be reflected on your next regular monthly statement. Please do not disregard your current billing statement.

CATEGORY I

FORM #	TITLE
HO-D	– DECLARATIONS
HO-END	– ENDORSEMENT DECLARATIONS
HO-3R	– SPECIAL FORM CONTRACT
HO-CA	– SPECIAL PROVISIONS
HO-90R CA	– WORKERS COMPENSATION
HO-216R	– PREMISES ALARM
HO-728R	– REPLACEMENT COST END.
HO-978R	– ADJUSTED BUILDING COST

CATEGORY II

FORM #	TITLE
320CA	– COMPLAINT NOTICE
960	– INFORMATION PRACTICES
1991	– WORKERS' COMPENSATION
11663	– STATE PREMIUM SURCHARGE

FOR U.S. CALLS: Policy Service 1-800-531-8111. Claims 1-800-531-8222.

EXCEPTIONS: Auto Claims in AK or HI – see your local Directory. If you are in the Washington D.C. Metro Area (Claims only), Colorado Springs, Denver, Highland Falls, Sacramento, San Antonio or Tampa, please see your LOCAL DIRECTORY for Policy Service and Claims.

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MAIL MACH-1

UNITED SERVICES AUTOMOBILE ASSOCIATION

LOGO

USAA Building – San Antonio, Texas 78228
HOMEOWNERS POLICY DECLARATIONS

This Declarations Page forms a part of your Homeowners policy. Please keep it with your policy papers.

Policy Number
USAA 165 45 98 92A

[illegible] Insured and Property Location
LAUGHLIN E WATERS AND
VOULA D WATERS HELD AS
COMMUNITY PROPERTY
112 NORTH JUNE STREET
LOS ANGELES, LOS ANGELES, CA 90004

POLICY PERIOD: From 07-15-90

To 07-15-91

(12:01 A.M. standard time at location of the principal reside [sic])

Coverage is provided where a premium or limit of liability is shown for the coverage.

Section I Coverages and Limit of Liability

A. Dwelling	C. Personal Property	D. Loss of Use
$1,615,000	$1,615,000	$323,000

Section II Coverages and Limit of Liability

E. Personal Liability Each occurrence	F. Medical Payments to Others Each person
$300,000	$5,000

Premium

[Basic] Policy Premium	Additional Premiums	Credits	Total Premium
$7,067	$704	$3,170CR	$4,601

STATE PREMIUM SURCHARGE $46.01

[illegible] and Endorsements made part of this policy at time of issue: HO 3 R, (01-88), HO-END (01-89), HO-CA (07-89), HO-978R (01-88), HO-216R (01-88), HO-728R (01-88), HO-90RCA (01-88).

DEDUCTIBLE – SECTION I $1000 ALL PERILS.

case of loss under Section 1 we cover only that part of the loss over the deductible stated.

MORTGAGEE (Name and Address)

Assignment of this policy shall not be valid except with the written consent of the Company.

WITNESS WHEREOF, this policy is signed on 05/21/90

/s/ Robert F. McDermott
Robert F. McDermott
Brigadier General, USAF (Retired)
Attorney-in-Fact

(Illegible) Ed 6-89

UNITED SERVICES AUTOMOBILE ASSOCIATION

HOMEOWNERS ENDORSEMENT DECLARATIONS

Specifically listed below are the Declarations and premiums for endorsements made a part of this Policy at the time of issue. The endorsements are attached stating terms and conditions.

Policy Number
USAA 165 45 98 92A

Policy Term:	07-15-90	07-15-91
	Inception	Expiration

HO-978R (01-88), ADJUSTED BUILDING COST ENDORSEMENT

TOTAL TERM PREMIUM NIL
HO-216R (01-88) PREMISES ALARM SYSTEM

TOTAL TERM PREMIUM $1057CR
HO-728R (01-88) REPLACEMENT COST ON CONTENTS ENDORSEMENT

TOTAL TERM PREMIUM $704
HO-90RCA (01-88) WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE ENDORSEMENT – CALIFORNIA

TOTAL TERM PREMIUM IS INCLUDED
HO-END-Ed. Illegible-89 5-21-90

USAA GROUP
USAA Building • San Antonio, Texas 78288

This is your Easy Reading

HOMEOWNERS POLICY.
The homeowners insurance contract between you and us consists of this policy plus your Declarations page and any applicable endorsements. The Quick Reference section below outlines essential information contained in the Declarations and the major parts of the policy.

Your policy provides the coverages and amounts of insurance shown in the Declarations with a premium.

READ YOUR POLICY, DECLARATIONS, AND ENDORSEMENTS CAREFULLY.

QUICK REFERENCE

DECLARATIONS PAGE
Your Name
Location of Your Residence
Policy Period
Coverages
Amounts of Insurance
Deductible

Beginning on Page

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RECIPROCAL PROVISIONS . . .

apply when United Services Automobile Association or USAA, is named on the Declarations as the Company.

A non-assessable policy

- Reciprocals
- Special definitions and provisions
- Plan of operation

In your policy these sets of words have the same meaning: Policy means Contract: You, Your or Insured means Subscriber: We, us, our, USAA or Company means Reciprocal or Interinsurance Exchange: Premium means Deposit: Chairman means Attorney-in-Fact.

Your policy is issued as part of an Interinsurance Exchange by the Chairman of USAA as Attorney-in-Fact under the authority given him by the subscribers.

No Contingent Liability: You are liable only for the amount of your premium since USAA has a free surplus in excess of the amount required by Article 19.03 of the Texas Insurance Code of 1951, as amended.

Participation: By purchasing this policy, you are a member of USAA and subject to its bylaws. You are

entitled to dividends as may be declared by us, after approval as required by the Texas Insurance Code of 1951, as amended.

AGREEMENT

We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

DEFINITIONS

In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We", "us" and "our" refer to the Company providing this insurance. In addition certain words and phrases are defined as follows:

1. "bodily injury" means bodily harm, sickness or disease, including required care, loss of services and death that results.
2. "business" includes trade, profession or occupation.
3. "insured" means you and residents of your household who are:
   a. your relatives; or
   b. other persons under the age of 21 and in the care of any person named above.

   Under SECTION II, "insured" also means:

   c. with respect to animals or watercraft to which this policy applies, any person or organization

legally responsible for these animals or watercraft which are owned by you or any person included in 3a or 3b above. A person or organization using or having custody of these animals or watercraft in the course of any business or without consent of the owner is not an insured;

d. with respect to any vehicle to which this policy applies:

(1) persons while engaged in your employ or that of any person included in 3a or 3b above; or

(2) other persons using the vehicle on an insured location with your consent.

4. "insured location" means:

a. the residence premises;

b. the part of other premises, other structures and grounds used by you as a residence;

c. any premises used by you in connection with a premises in 4a or 4b above;

d. any part of a premises:

(1) not owned by an insured; and

(2) where an insured is temporarily residing;

e. vacant land, other than farm land, owned by or rented to an insured;

f. land owned by or rented to an insured on which a one or two family dwelling is being built as a residence for an insured;

g. individual or family cemetery plots or burial vaults of an insured; or

h. any part of a premises occasionally rented to an insured for other than business use.

5. "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in

   a. bodily injury; or

   b. property damage.

6. "property damage" means physical injury to, destruction of, or loss of use of tangible property.

7. "residence employee" means:

   a. an employee of an insured whose duties are related to the maintenance or use of the residence premises, including household or domestic services; or

   b. one who performs similar duties elsewhere not related to the business of an insured.

8. "residence premises" means:

   a. the one family dwelling, other structures, and grounds; or

   b. that part of any other building;

   where you reside and which is shown as the "residence premises" in the Declarations.

   "Residence premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declaration.

SECTION I – PROPERTY COVERAGES

COVERAGE A – DWELLING

We cover:

1. the dwelling on the residence premises shown in the Declarations, including structures attached to the dwelling;
2. materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the residence premises; and
3. permanently installed carpeting.

This coverage does not apply to land, including land on which the dwelling is located.

COVERGE B – Other Structures

We cover other structures on the residence premises set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

This coverage does not apply to land, including land on which the other structures are located.

We do not cover other structures:

1. used in whole or in part for business; or
2. rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage.

The limit of liability for this coverage will not be more than 10% of the limit of liability that applies to Coverage A. Use of this coverage does not reduce the Coverage A limit of liability.

COVERAGE C – Personal Property

Subject to the Special Limits of Liability and Property Not Covered provisions below, we cover personal property owned or used by an insured while it is anywhere in the world. At your request, we will cover personal property owned by:

1. others while the property is on the part of the residence premises occupied by an insured;
2. a guest or a residence employee, while the property is in any residence occupied by an insured.

Our limit of liability for personal property usually located at an insured's residence, other than the residence premises, is 10% of the limit of liability for Coverage C, or $1,000, whichever is greater. Personal property in a newly acquired principal residence is not subject to this limitation for the 30 days from the time you begin to move the property there.

Special Limits of Liability. These limits do not increase the Coverage C limit of liability. The special limit for each numbered category below is the total limit for each loss for all property in that category.

1. $200 on money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins and medals.

2. $1,000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, personal records, passports, tickets and stamps. This limit includes the cost to research, replace or restore the information from the lost or damaged material. This dollar limit applies to these categories regardless of the medium (such as paper or computer software on which the material exists.

3. $1,000 on watercraft, including their trailers, furnishings, equipment and outboard motors.

4. $1,000 on trailers not used with watercraft.

5. $1,000 on grave markers.

6. $1,000 for loss by theft of jewelry, watches, furs, precious and semi-precious stones.

7. $2,000 for loss by theft of firearms.

8. $2,500 for loss by theft of silverware, silver-plated ware, goldware, gold-plated ware and pewterware. This includes flatware, hollowware, tea sets, trays and trophies made of or including silver, gold or pewter.

9. $2,500 on property, on the residence premises, used at any time or in any manner for any business purpose.

10. $250 on property, away from the residence premises, used at any time or in any manner for any business purpose.

11. $3,000 on motorized golf carts and their equipment and accessories. But if, at the time of loss, there is an automobile policy covering physical loss to golf carts, then this policy does not apply to those golf carts and their equipment and accessories.

Property Not Covered. We do not cover:

1. articles separately described and specifically insured in this or other insurance;

2. animals, birds or fish;

3. motor vehicles or all other motorized land conveyances. This includes:

   a. equipment and accessories; or

   b. any device or instrument for the transmitting, recording, receiving or reproduction of sound or pictures which is operated by power from the electrical system of motor vehicles or all other motorized land conveyances, including:

      (1) accessories or antennas; or

      (2) tapes, wires, records, discs or other media for use with any such device or instrument;

   while in or upon the vehicle or conveyance.

   We do cover vehicles or conveyances not subject to motor vehicle registration which are:

   a. used to service an insured's residence; or

   b. designed for assisting the handicapped.

   We also cover motorized golf carts and their equipment and accessories, subject to the provisions under Special Limits of Liability.

4. aircraft and parts. Aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo;

5. property of roomers, boarders and other tenants, except property of roomers and boarders related to an insured;

6. property in an apartment regularly rented or held for rental to others by an insured;

7. property rented or held for rental to others off the residence premises;

8. business data, including such data stored in:

   a. books of account, drawings or other paper records; or

   b. electronic data processing tapes, wires, records, discs or other software media.

   However, we do cover the cost of (illegible) recording or storage media, and of pre-recorded computer programs available on the retail market.

9. credit cards or fund transfer cards except as provided in ADDITIONAL COVERAGES.

COVERAGE D – Loss Of use

The limit of liability for Coverage D is the total limit for all the coverages that follow.

1. If a loss caused by a Peril Insured Against makes that part of the residence premises where you reside not fit to live in, we cover, at your choice, either of the following. However, if the residence premises is not your principal place of residence, we will not provide the option under paragraph b below.

   a. Additional Living Expense, meaning any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living; or

   b. Fair Rental Value, meaning the fair rental value of that part of the residence premises where you reside less any expenses that do not continue while the premises is not fit to live in.

Payment under a. or b. will be for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

2. If a loss caused by a Peril Insured Against makes that part of the residence premises rented to others or held for rental by you not fit to live in, we cover the:

   Fair Rental Value, meaning the fair rental value of that part of the residence premises rented to others or held for rental by you less any expenses that do not continue while the premises is not fit to live in.

   Payment will be for the shortest time required to repair or replace that part of the premises rented or held for rental.

3. If a civil authority prohibits you from use of the residence premises as a result of direct damage to neighboring premises by a Peril Insured Against in this policy, we cover the Additional Living Expense or Fair Rental Value loss as provided under 1 and 2 above for no more than two weeks.

The periods of time under 1, 2 and 3 above are not limited by expiration of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

No deductible applies to this coverage.

ADDITIONAL COVERAGES

1. Debris Removal. We will pay your reasonable expense for the removal of:

a. debris of covered property if a Peril Insured Against that applies to the damaged property causes the loss; or

b. ash, dust or particles from a volcanic eruption that has caused direct loss to a building or property contained in a building.

This expense is included in the limit of liability that applies to the damaged property. When the amount payable for the actual damage to the property plus the expense for debris removal exceeds the limit of liability for the damaged property, an additional 5% of that limit of liability will be available to cover debris removal expense.

We will also pay for your reasonable expense, up to $600 in the aggregate, for the removal from the residence premises of:

a. your tree(s) felled by the peril of Windstorm or hail;

b. your tree(s) felled by the peril of Weight of ice, snow or sleet; or

c. a neighbor's tree(s) felled by a Peril Insured Against under Coverage C;

provided the tree(s) damages a covered structure.

2. Reasonable Repairs. In the event that covered property is damaged by an applicable Peril Insured Against, we will pay the reasonable cost incurred by you for necessary measures taken solely to protect against further damage, if the measures taken involve repair to other damaged property, we will pay for those measures only if that property is covered under this policy and the damage to that property is caused by an applicable Peril Insured Against.

This coverage

a. does not increase the limit of liability that applies to the covered property;

b. does not relieve you of your duties, in case of a loss to covered property, as set forth in SECTION I – CONDITIONS 2d.

3. Trees, Shrubs and Other Plants. We cover trees, shrubs, plants or lawns, on the residence premises, for loss caused by the following Perils Insured Against Fire or lightning, Explosion, Riot or civil commotion, Aircraft Vehicles not owned or operated by a resident of the residence premises, Vandalism or malicious mischief or Theft.

   The limit of liability for this coverage will not be more than 5% of the limit of liability that applies to the dwelling, or more than $500 for any one tree, shrub or plant. We do not cover property grown for business purposes.

   This coverage is additional insurance.

4. Fire Department Service Charge. We will pay up to $500 for your liability assumed by contract or agreement for fire department charges incurred when the fire department is called to save or protect covered property from a Peril Insured Against. We do not cover fire department service charges if the property is located within the limits of the city, municipality or protection district furnishing the fire department response.

   This coverage is additional insurance. No deductible applies to this coverage.

5. Property Removed. We insure covered property against direct loss from any cause while being removed from a premises endangered by a Peril

Insured Against and for no more than 30 days while removed. This coverage does not change the limit of liability that applies to the property being removed.

6. Credit Card, Fund Transfer Card, Forgery and Counterfeit Money.

   We will pay up to $1,000 for:

   a. the legal obligation of an insured to pay because of the theft or unauthorized use of credit cards issued to or registered in an insured's name;

   b. loss resulting from theft or unauthorized use of a fund transfer card used for deposit, withdrawal or transfer of funds, issued to or registered in an Insured's name;

   c. loss to an Insured caused by forgery or alteration of any check or negotiable instrument and

   d. loss to an Insured through acceptance in good faith of counterfeit United States or Canadian paper currency.

   We do not cover use of a credit card or fund transfer card:

   a. by a resident of your household:

   b. by a person who has been entrusted with either type of cards; or

   c. if an Insured has not complied with all terms and conditions under which the cards are issued.

   All loss resulting from a series of acts committed by any one person or in which any one person is concerned or implicated is considered to be one loss.

   We do not cover loss arising out of business use or dishonesty of an Insured.

This coverage is additional insurance. No deductible applies to this coverage.

Defense:

a. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to defend a claim or suit ends when the amount we pay for the loss equals our limit of liability.

b. If a suit is brought against an insured for liability under the Credit Card or Fund Transfer Card coverage, we will provide a defense at our expense by counsel of our choice.

c. We have the option to defend at our expense an Insured or an Insured's bank against any suit for the enforcement of payment under the Forgery coverage.

7. Loss Assessment. We will pay up to $1,000 for your share of loss assessment charged during the policy period against you by a corporation or association of property owners, when the assessment is made as a result of direct loss to the property, owned by all members collectively, caused by a Peril Insured Against under Coverage A – Dwelling, other than earthquake or land shock waves or tremors before, during or after a volcanic eruption.

   This coverage applies only to loss assessments charged against you as owner or tenant of the residence premises.

   We do not cover loss assessments charged against you or a corporation or association of property owners by any governmental body.

   The limit of $1,000 is the most we will pay with respect to any one loss, regardless of the number of assessments.

Condition 1. Policy Period, under SECTIONS I and II – CONDITIONS, does not apply to Loss Assessment.

8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

   a. Perils Insured Against in Coverage C – Personal Property. These perils apply to covered building and personal property for loss insured by this additional coverage:

   b. hidden decay;

   c. hidden insect or vermin damage;

   c. weight of contents, equipment, animals or people;

   e. weight of rain which collects on a roof; or

   f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

   Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b, c, d, e and f unless the loss is a direct result of the collapse of a building.

   Collapse does not include settling, cracking, shrinking, bulging or expansion.

   This coverage does not increase the limit of liability that applies to the damaged covered property.

9. Lock Replacement. When the dwelling door keys are stolen in a covered theft loss, we will pay the cost to:

a. change the combination in the lock cylinder of the door locks as needed; or

b. change the lock hardware of the doors as needed.

The limit of liability for Lock Replacement is $250. No deductible applies to this coverage.

10. Food Spoilage. We will pay you up to $500 for loss caused by Power Failure to the contents of a freezer or a refrigerator located on the residence premises.

This coverage does not increase the Coverage C limit of liability. No deductible applies to this coverage. The Power Failure exclusion under SECTION I – EXCLUSIONS, does not apply to Food Spoilage.

SECTION I – PERILS INSURED AGAINST

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

1. involving collapse, other than as provided in ADDITIONAL COVERAGES. Collapse.

2. caused by:

   a. freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion

applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to:

(1) maintain heat in the building; or

(2) shut off the water supply and drain the system and appliances of water;

b. freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(1) fence, pavement, patio or swimming pool;

(2) foundation, retaining wall or bulkhead; or

(3) pier, wharf or dock;

c. theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied;

d. vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

e. constant or repeated seepage or leakage of water or steam over a period of weeks, months or years from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance;

f. (1) wear and tear, marring, deterioration;

(2) inherent vice, latent defect, mechanical breakdown;

(3) smog, rust, mold, wet or dry rot;

(4) smoke from agricultural smudging or industrial operations;

(5) release, discharge or dispersal of contaminants or pollutants;

(6) settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings; or

(7) birds, vermin, rodents, insects or domestic animals.

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which this water escaped.

3. excluded under SECTION I – EXCLUSIONS

Under items 1 and 2, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

COVERAGE C – PERSONAL PROPERTY

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I – EXCLUSIONS.

1. Fire or lightning.

2. Windstorm or hail.

This peril does not include loss to the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof

or wall and the rain, snow, sleet, sand or dust enters through this opening.

This peril includes loss to watercraft and their trailers, furnishings, equipment and outboard motors, only while inside a fully enclosed building.

3. Explosion.

4. Riot or civil commotion.

5. Aircraft, including self-propelled missiles and spacecraft.

6. Vehicles.

7. Smoke, meaning sudden and accidental damage from smoke.

   This peril does not include loss caused by smoke from agricultural smudging or industrial operations.

8. Vandalism or malicious mischief.

9. Theft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen.

   This peril does not include loss caused by theft:

   a. committed by an Insured;

   b. in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied; or

   c. from that part of a residence premises rented by an Insured to other than an Insured.

   This peril does not include loss caused by theft that occurs off the residence premises of:

   a. property while at any other residence owned by, rented to, or occupied by an insured, except

while an Insured is temporarily living there. Property of a student who is an insured is covered while at a residence away from home if the student has been there at any time during the 45 days immediately before the loss;

b. watercraft, including their furnishings, equipment and outboard motors; or

c. trailers and campers.

10. Falling objects.

This peril does not include loss to property contained in a building unless the roof or an outside wall of the building is first damaged by a falling object. Damage to the falling object itself is not included.

11. Weight of ice, snow or sleet which causes damage to property contained in a building.

12. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance. In this peril, a plumbing system does not include a sump pump, sump well or similar device designed to drain water from the foundation area.

This peril does not include loss:

a. to the system or appliance from which the water or steam escaped;

b. caused by or resulting from freezing except as provided in the peril of Freezing below; or

c. on the residence premises caused by accidental discharge or overflow which occurs off the residence premises.

13. Sudden and accidental tearing apart, cracking, burning or bulging of a steam or hot water heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

    This peril does not include loss caused by or resulting from freezing.

14. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance.

    This peril does not include loss on the residence premises while the dwelling is unoccupied, unless you have used reasonable care to:

    a. maintain heat in the building; or

    b. shut off the water supply and drain the system and appliances of water.

15. Sudden and accidental damage from artificially generated electrical current. This peril does not include loss to a tube transistor or similar electronic component.

16. Damage by glass or safety glazing material which is part of a building, storm door or storm window.

    This peril does not include loss on the residence premises if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.

17. Volcanic eruption other than loss caused by earthquake, land shock waves or tremors.

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

   a. Ordinance or Law, meaning enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, unless specifically provided under this policy.

   b. Earth Movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mudflow; earth sinking, rising or shifting; unless direct loss by:

      (1) fire;

      (2) explosion; or

      (3) breakage of glass or safety glazing material which is part of a building, storm door or storm window;

      ensues and then we will pay only for the ensuing loss.

      This exclusion does not apply to loss by theft.

   c. Water Damage, meaning:

      (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

      (2) water which backs up through sewers or drains or which overflows from a sump

pump, sump well or similar device designed to drain water from the foundation area; or

(3) water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire, explosion or theft resulting from water damage is covered.

d. Power Failure, meaning the failure of power or other utility service if the failure takes place off the residence premises, except as provided in ADDITIONAL COVERAGES. Food Spoilage. But, if a Peril Insured Against ensues on the residence premises, we will pay only for that ensuing loss.

e. Neglect, meaning neglect of the Insured to use all reasonable means to save and preserve property at and after the time of a loss.

f. War, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

g. Nuclear Hazard, to the extent set forth in the Nuclear Hazard Clause of SECTION I – CONDITIONS.

h. Intentional Loss, meaning any loss arising out of any act committed;

(1) by or at the direction of an Insured; and

(2) with the intent to cause a loss.

2. We do not insure for loss caused by any of the following. However, any ensuing loss which is not excluded or excepted in this policy is covered.

a. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

c. Faulty, inadequate or defective:

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) materials used in repair, construction, renovation or remodeling; or

(4) maintenance;

of part or all of any property whether on or off the residence premises.

SECTION I – CONDITIONS

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1. Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss.

a. to the Insured for more than the amount of the insured's interest at the time of loss; or

b. for more than the applicable limit of liability.

2. Your Duties After Loss, in case of a loss to covered property, you must see that the following are done:

a. give prompt notice to us or our agent;

b. notify the police in case of loss by theft;

c. notify the credit card or fund transfer card company in case of loss under ADDITIONAL COVERAGES, Credit Card or Fund Transfer Card coverage;

d. (1) protect the property from further damage;

(2) make reasonable and necessary repairs to protect the property; and

(3) keep an accurate record of repair expenses;

e. prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;

f. as often as we reasonably require:

(1) show the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and

(3) submit to examination under oath, while not in the presence of any other insured, and sign the same;

g. send to us within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) the time and cause of loss;

(2) the interest of the insured and all others in the property involved and all liens on the property;

(3) other insurance which may cover the loss;

(4) changes in title or occupancy of the property during the term of the policy;

(5) specifications of damaged buildings and detailed repair estimates;

(6) the inventory of damaged personal property described in 2e above;

(7) receipts for Additional Living Expenses incurred and records that support the Fair Rental Value loss; and

(8) evidence or affidavit that supports a claim under ADDITIONAL COVERAGES. Credit Card, Fund Transfer Card, Forgery and Counterfeit Money coverage, stating the amount and cause of loss

3. Loss Settlement. Covered property losses are settled as follows:

a. (1) Personal property;

(2) Awnings, household appliances, outdoor antennas, and outdoor equipment, whether or not attached to buildings; and

(3) Structures that are not buildings;

at actual cash value at the time of loss but not more than the amount required to repair or replace.

b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:

(1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

(a) the limit of liability under this policy that applies to the building;

(b) the replacement cost of that part of the building damaged for like construction and use on the same premises; or

(c) the necessary amount actually spent to repair or replace the damaged building.

(2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

(a) the actual cash value of that part of the building damaged; or

(b) that proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of

insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.

(3) To determine the amount of insurance required to equal 80% of the full replacement cost of the building immediately before the loss, do not include the value of:

(a) excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;

(b) those supports in (a) above which are below the surface of the ground inside the foundation walls, if there is no basement; and

(c) underground flues, pipes, wiring and drains.

(4) We will pay no more than the actual cash value of the damage unless:

(a) actual repair or replacement is complete; or

(b) the cost to repair or replace the damage is both:

(i) less than 5% of the amount of insurance in this policy on the building; and

(ii) less than $2,500.

(5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability on a replacement cost basis.

4. Loss to a Pair or Set. In case of loss to a pair or set we may elect to:

   a. repair or replace any part to restore the pair or set to its value before the loss; or

   b. pay the difference between actual cash value of the property before and after the loss.

5. Glass Replacement. Loss for damage to glass caused by a Peril Insured Against will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

6. Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the residence premises is located. The appraisers will separately set the amount of loss. If the appraiser's submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

   Each party will:

   a. pay its own appraiser; and

   b. bear the other expenses of the appraisal and umpire equally.

7. Other Insurances. If a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

This policy does not apply to motorized golf carts and their equipment and accessories when an automobile policy also applies.

8. Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

9. Our Option. If we give you written notice within 30 days after we receive your signed, sworn proof of loss, we may repair or replace any part of the damaged property with like property.

10. Loss Payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

    a. reach an agreement with you;

    b. there is an entry of a final judgment; or

    c. there is a filing of an appraisal award with us.

11. Abandonment of Property. We need not accept any property abandoned by an insured.

12. Mortgage Clause. The word "mortgagee" includes trustee.

    If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

    If we deny your claim, that denial shall not apply to a valid claim of the mortgagees, if the mortgagee:

a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. pays any premium due under this policy on demand if you have neglected to pay the premium; and

c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If the policy is cancelled or not renewed by us, the mortgagee will be notified at least 10 days before the date cancellation or non-renewal takes effect.

If we pay the mortgagee for any loss and deny payment to you:

a. we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

13. No Benefit to Bailee. We will not recognize any assignment or grant any coverage that benefits a person or organization holding, storing or moving property for a fee regardless of any other provision of this policy.

14. "Nuclear Hazard" Clause.

    a. "Nuclear Hazard" means any nuclear reaction, radiation, or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these.

    b. Loss caused by the "Nuclear Hazard" will not be considered loss caused by fire, explosion or smoke, whether these perils are specifically named in or otherwise included within the Perils Insured Against in SECTION 1.

    c. This policy does not apply under SECTION 1 to loss caused directly or indirectly by "Nuclear Hazard", except that direct loss by fire resulting from the "Nuclear Hazard" is covered.

15. Recovered Property. If you or we recover any property for which we have made payment under this policy, you or we will notify the other of the recovery. At your option, the property will be returned to or retained by you, or it will become our property. If the recovered property is returned to or retained by you, the loss payment will be adjusted based on the amount you received for the recovered property.

16. Volcanic Eruption Period. One or more volcanic eruptions that occur within a 72-hour period will be considered as one volcanic eruption.

SECTION II – LIABILITY COVERAGES

COVERAGE E – Personal Liability

If a claim is made or a suit is brought against an Insured for damages because of bodily injury or property damage

caused by an occurrence to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the insured is legally liable; and

2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

COVERAGE F – Medical Payments To Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing bodily injury. Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to you or regular residents of your household except residence employees. As to others, this coverage applies only:

1. to a person on the insured location with the permission of an insured; or

2. to a person off the insured locations, if the bodily injury:

   a. arises out of a condition on the insured location or the ways immediately adjoining;

   b. is caused by the activities of an insured;

   c. is caused by a residence employee in the course of the residence employee's employment by an insured; or

d. is caused by an animal owned by or in the care of an insured.

SECTION II – EXCLUSIONS

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1. Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage:

   a. which is expected or intended by the Insured;

   b. (1) arising out of or in connection with a business engaged in by an Insured. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance. Involving a service or duty rendered, promises, owed, or implied to be provided because of the nature of the business;

   (2) arising out of the rental or holding for rental of any part of any premises by an Insured. This exclusion does not apply to the rental or holding for rental of an insured location:

   (i) on an occasional basis if used only as a residence;

   (ii) in part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or

   (iii) in part, as an office, school, studio or private garage;

c. arising out of the rendering of or failure to render professional services;

d. arising out of a premises:

(1) owned by an insured;

(2) rented to an insured; or

(3) rented to others by an insured;

that is not an insured location;

e. arising out of:

(1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured;

(2) the entrustment by an insured of a motor vehicle or any other motorized land conveyance to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above.

This exclusion does not apply to:

(1) a trailer not towed by or carried on a motorized land conveyance;

(2) a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and;

(a) not owned by an insured; or

(b) owned by an insured and on an insured location;

(3) a motorized golf cart when used to play golf on a golf course;

(4) a vehicle or conveyance not subject to motor vehicle registration which is:

(a) used to service an insured's residence;

(b) designed for assisting the handicapped; or

(c) in dead storage on an insured location;

f. arising out of:

(1) the ownership, maintenance, use, loading or unloading of a watercraft described below;

(2) the entrustment by an insured of a watercraft described below to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a watercraft described below.

Watercraft

(1) with inboard or inboard-outdrive motor power of more than 50 horsepower owned by or rented to an insured;

(2) that is a sailing vessel, with or without auxiliary power, which is more than 35 feet in length owned by or rented to an insured; or

(3) powered by one or more outboard motors with more than 50 total horsepower if the outboard motor is owned by an insured. But, outboard motors of more than 50 total horsepower are covered for the policy period if:

(a) you acquire them prior to the policy period and:

(i) you declare them at policy inception; or

(ii) your intention to insure is reported to us in writing within 45 days after you acquire the outboard motors;

(b) you acquire them during the policy period.

This exclusion does not apply while the watercraft is stored.

g. arising out of:

(1) the ownership, maintenance, use, loading or unloading of an aircraft;

(2) the entrustment by an insured of an aircraft to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft.

An aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo.

h. caused directly or indirectly by war, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

i. which arises out of the transmission of a communicable disease by an insured.

Exclusions d, e, f, and g, do not apply to bodily injury to a residence employee arising out of and in the course of the residence employee's employment by an insured.

2. Coverage E – Personal Liability does not apply to:

a. liability:

(1) for any loss assessment charged against you as a member of an association, corporation or community of property owners;

(2) under any contract or agreement. However, this exclusion does not apply to written contracts:

(a) that directly relate to the ownership, maintenance or use of an insured location; or

(b) where the liability of others is assumed by the insured prior to an occurrence;

unless excluded in (1) above or elsewhere in this policy;

b. property damage to property owned by the Insured;

c. property damage to property rented to, occupied or used by or in the care of the insured. This exclusion does not apply to property damage caused by fire, smoke or explosion;

d. bodily injury to any person eligible to receive any benefits:

(1) voluntarily provided; or

(2) required to be provided;

by the insured under any:

(1) workers' compensation law;

(2) non-occupational disability law; or

(3) occupational disease law;

e. bodily injury or property damage for which an insured under this policy:

(1) is also an insured under a nuclear energy liability policy; or

(2) would be an insured under that policy but for the exhaustion of its limit of liability.

A nuclear energy liability policy is one issued by:

(1) American Nuclear Insurers:

(2) Mutual Atomic Energy Liability Underwriters;

(3) Nuclear Insurance Association of Canada;

or any of their successors:

f. bodily injury to you or an insured within the meaning of part a. or b. of "Insured" as defined.

3. Coverage F – Medical Payments to Others does not apply to bodily injury:

a. to a residence employee if the bodily injury:

(1) occurs off the insured location; and

(2) does not arise out of or in the course of the residence employee's employment by an insured;

b. to any person eligible to receive benefits:

(1) voluntarily provided; or

(2) required to be provided;

under any:

(1) workers' compensation law;

(2) non-occupational disability law; or

(3) occupational disease law;

c. from any:

(1) nuclear reaction;

(2) nuclear radiation; or

(3) radioactive contamination;

all whether controlled or uncontrolled or however caused; or

(4) any consequence of any of these;

d. to any person, other than a residence employee of an insured, regularly residing on any part of the insured location.

SECTION II – ADDITIONAL COVERAGES

We cover the following in addition to the limits of liability:

1. Claim Expenses. We pay:

a. expenses we incur and costs taxed against an insured in any suit we defend;

b. premiums on bonds required in a suit we defend, but not for bond amounts more than the

limit of liability for Coverage E. We need not apply for or furnish any bond;

c. reasonable expense incurred by an insured at our request, including actual loss of earnings (but not loss of other income) up to $50 per day, for assisting us in the investigation or defense of a claim or suit;

d. interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies;

e. prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of liability, we will not pay any prejudgment interest based on that period of time after the offer.

2. First Aid Expenses. We will pay expenses for first aid to others incurred by an insured for bodily injury covered under this policy. We will not pay for first aid to you or any other Insured.

3. Damage to Property of Others. We will pay, at replacement cost, up to $500 per occurrence for property damage to property of others caused by an Insured.

We will not pay for property damage:

a. to the extent of any amount recoverable under SECTION 1 of this policy;

b. caused intentionally by an insured who is 13 years of age or older;

c. to property owned by an insured;

d. to property owned by or rented to a tenant of an insured or a resident in your household; or

e. arising out of:

(1) a business engaged in by an insured;

(2) any act or omission in connection with a premises owned, rented or controlled by an insured, other than the insured location; or

(3) the ownership, maintenance or use of aircraft, watercraft or motor vehicles or all other motorized land conveyances.

This exclusion does not apply to any motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and not owned by an insured.

4. Loss Assessment. We will pay up to $1,000 for your share of loss assessment charged during the policy period against you by a corporation or association of property owners, when the assessment is made as a result of:

a. bodily injury or property damage not excluded under SECTION II of this policy; or

b. liability for an act of a director, officer or trustee in the capacity as a director, officer or trustee, provided:

(1) the director, officer or trustee is elected by the members of a corporation or association of property owners; and

(2) the director, officer or trustee serves without deriving any income from the exercise of duties which are solely on behalf of a corporation or association of property owners.

This coverage applies only to loss assessments charged against you as owner or tenant of the residence premises.

We do not cover loss assessments charged against you or a corporation or association of property owner's by any governmental body.

Regardless of the number of assessments, the limit of $1,000 is the most we will pay for loss arising out of:

a. one accident, including continuous or repeated exposure to substantially the same general harmful conditions; or

b. a covered act of a directory, officer or trustee. An act involving more than one director, officer or trustee is considered to be a single act

The following do not apply to this coverage:

1. SECTION II, Coverage E – Personal Liability Exclusion 2a(1):

2. Condition 1.Policy Period, under SECTIONS I and II – CONDITIONS.

SECTION II – CONDITIONS

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1. Limit of Liability. Our total liability under Coverage E for all damages resulting from any one occurrence will not be more than the limit of liability for Coverage E as shown in the Declarations. This limit is the same regardless of the number of insureds, claims made or persons injured. All bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the

same general harmful conditions shall be considered to be the result of one occurrence.

Our total liability under Coverage F for all medical expenses payable for bodily injury to one person as the result of one accident will not be more than the limit of liability for Coverage F as shown in the Declarations.

2. Severability of Insurance. This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence.

3. Duties After Loss. In case of an accident or occurrence, the insured will perform the following duties that apply. You will help us by seeing that these duties are performed:

   a. give written notice to us or our agent as soon as is practical, which sets forth:

      (1) the identity of the policy and insured;

      (2) reasonably available information on the time, place and circumstances of the accident or occurrence; and

      (3) names and addresses of any claimants and witnesses;

   b. promptly forward to us every notice, demand, summons or other process relating to the accident or occurrence;

   c. at our request, help us:

      (1) to make settlement;

      (2) to enforce any right of contribution or indemnity against any person or organization who may be liable to an Insured;

      (3) with the conduct of suits and attend hearings and trials;

(4) to secure and give evidence and obtain the attendance of witnesses;

d. under Damage to Property of Others, submit to us within 80 days after the loss, a sworn statement of loss and show the damaged property, if in the insured's control;

e. the insured will not, except at the insured's own cost, voluntarily make payment, assume obligation or incur expense other than for first aid to others at the time of the bodily injury.

4. Duties of an Injured Person – Coverage F – Medical Payments to Others. The injured person or someone acting for the injured person will:

a. give us written proof of claim, under oath if required, as soon as is practical; and

b. authorize us to obtain copies of medical reports and records.

The injured person will submit to a physical exam by a doctor of our choice when and as often as we reasonably require.

5. Payment of Claim – Coverage F – Medical payments to Others. Payment under this coverage is not an admission of liability by an insured or us.

6. Suit Against Us. No action can be brought against us unless there has been compliance with the policy provisions.

No one will have the right to join us as a party to any action against an insured. Also, no action with respect to Coverage E can be brought against us until the obligation of the insured has been determined by final judgment or agreement signed by us.

7. Bankruptcy of an Insured. Bankruptcy or insolvency of an insured will not relieve us of our obligations under this policy.

8. Other Insurance – Coverage E – Personal Liability. This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

SECTIONS I and II – CONDITIONS

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1. Policy Period. This policy applies only to loss in SECTION I or bodily injury or property damage in SECTION II, which occurs during the policy period.

2. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an insured has:

   a. intentionally concealed or misrepresented any material fact or circumstance;

   b. engaged in fraudulent conduct; or

   c. made false statements;

   relating to this insurance.

3. Liberalization Clause. If we make a change which broadens coverage under this edition of our policy without additional premium charge, that change will automatically apply to your insurance as of the date we implement the change in your state, provided that this implementation date falls within 60 days prior to or during the policy period stated in the Declarations.

   This Liberalization Clause does not apply to changes implemented through introduction of a subsequent edition of our policy.

4. Waiver or Change of Policy Provisions. A waiver or change of a provision of this policy must be in writing by us to be valid. Our request for an appraisal or examination will not waive any of our rights.

5. Cancellation.

   a. You may cancel this policy at any time by returning it to us or by giving us advance written notice of the date cancellation is to take effect.

   b. We may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations.

      Proof of mailing will be sufficient proof of notice.

      (1) When you have not paid the premium, we may cancel at any time by letting you know at least 10 days before the date cancellation takes effect.

      (2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by letting you know at least 10 days before the date cancellation takes effect.

      (3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel:

         (a) if there has been a material misrepresentation of fact which if known to us would have caused us not to issue the policy; or

(b) if the risk has changed substantially since the policy was issued.

This can be done by letting you know at least 30 days before the date cancellation takes effect.

c. When this policy is canceled, the premium for the period from the date of cancellation to the expiration date will be refunded pro rata.

d. If the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

6. Non-Renewal. We may elect not to renew this policy. We may do so by delivering to you, or mailing to you at your mailing address shown in the Declarations, written notice at least 30 days before the expiration date of this policy. Proof of mailing will be sufficient proof of notice.

7. Assignment. Assignment of this policy will not be valid unless we give our written consent.

8. Subrogation. An insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

If an assignment is sought, an insured must sign and deliver all related papers and cooperate with us.

Subrogation does not apply under SECTION II to Medical Payments to Others or Damage to property of Others.

9. Death. If any person named in the Declarations or the spouse, if a resident of the same household, dies:

a. we insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;

b. insured includes:

(1) any member of your household who is an insured at the time of your death, but only while a resident of the residence premises; and

(2) with respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

CALIFORNIA SPECIAL PROVISIONS

SECTION I – CONDITIONS

10. Loss Payment, is deleted and replaced by the following:

10. Loss payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 30 days after we receive your proof of loss and:

a. reach an agreement with you;

b. there is an entry of a final judgment: or

c. there is a filing of an appraisal award with us.

SECTIONS I AND II – CONDITIONS

5. Cancellation is deleted and replaced by the following:

a. The person named on the Declarations Page may cancel this policy at any time by giving us written notice. But the cancellation cannot take effect before the date of the notice. Return premium will be computed on a pro rata basis.

b. We may cancel this policy only for the reasons stated below by letting the person named on the Declarations Page know in writing of the date cancellation takes effect. This cancellation notice will be mailed to the person named on the Declarations Page at his mailing address shown in the Declarations.

Proof of mailing will be sufficient proof of notice.

(1) When the person named on the Declarations Page has not paid the premium, we may cancel at any time by letting the person named on the Declarations Page know at least 10 days before the date cancellation takes effect.

(2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by notifying the person named on the Declarations Page at least 10 days before the date cancellation takes effect.

(3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel for one or more of the following reasons by notifying the person named on the Declarations Page 30 days before the cancellation takes effect.

(a) Conviction of the person named on the Declarations Page of a crime having as one of

its necessary elements an act increasing any hazard insured against.

(b) discovery of fraud or material misrepresentation by either of the following:

1. an insured or his or her representative in obtaining the insurance;

2. the person shown on the Declarations Page or his or her representative in pursuing a claim under this policy;

(c) discovery of grossly negligent acts or omissions by an insured or his or her representative substantially increasing any of the hazards insured against.

(d) physical changes in the insured property which result in the property becoming uninsurable.

d. If, when we cancel this policy, the return premium is not refunded with the notice of cancellation, we will refund it within 25 days after the date cancellation takes effect. If, when the person named on the Declarations cancels this policy, the return premium is not refunded when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

6. Non-Renewal is deleted and replaced by the following:

6. Non-Renewal. We may elect not to renew this policy. We may do so by delivering to the person named on the Declarations at the mailing address shown in the Declarations, written notice at least 45 days before the expiration date of this policy. Proof of mailing shall be sufficient proof of notice.

If this policy is written for a period of less than one year, we agree not to refuse to renew except at the end of an annual period commencing with the original or renewal effective date.

All other provisions of this policy apply.

WORKERS' COMPENSATION – CALIFORNIA
Residence Employees

We agree, with respect to residence employees:

Under Coverage I

To pay when due all benefits required of an insured by the California Workers' Compensation Law; and

Under Coverage II

To pay on behalf of an insured all damages for which the insured is legally liable because of bodily injury sustained by a residence employee. The bodily injury must be caused by accident or disease and arise out of and in the course of employment by the insured while:

a. in the United States of America, its territories or possessions, or Canada, or

b. temporarily elsewhere if the residence employee is a citizen or resident of the United States or Canada.

Coverage II does not apply to any suit brought in or judgment rendered by any court outside the United States of America, its territories and possessions, or Canada, or to any action on such judgment.

Who is Covered

A residence employee is covered if during the 90 calendar days immediately before the date of injury the employee has:

a. actually been engaged in such employment by the insured for no less than 52 hours, and

b. earned no less than one hundred dollars ($100) in wages.

Application of Coverage

This insurance applies only to bodily injury which occurs during the policy period. If the bodily injury is a disease, it must be caused or aggravated by the conditions of the residence employee's employment by the insured.

Policy Provisions

This insurance is subject to all the provisions of this endorsement and the following provisions of this policy:

a. Under Section I and II – Conditions:
   4. Waiver or Change of Policy Provisions.
   5. Cancellation.
   7. Assignment.
   8. Subrogation.

b. Under Section II – Conditions:
   3. Duties After Loss.
   6. Suit Against Us.

c. Our agreement to defend the insured as provided under Coverage E – Personal Liability.

d. Under Section II – Additional Coverages:

1. Claim Expenses.

2. First Aid Expenses.

e. The definition of "bodily injury", "business", "insured" and "residence employee".

Additional Provisions Applicable to Coverage I

The following provisions are applicable to Coverage I:

a. We shall be directly and primarily liable to any residence employee of an insured entitled to the benefits of the California Workers' Compensation Law.

b. As between the residence employee and us, notice to or knowledge of the occurrence of the injury on the part of an insured will be deemed notice or knowledge on our part.

c. The jurisdiction of an insured will, for the purpose of the law imposing liability for compensation, be our jurisdiction.

d. We will be subject to the orders, findings, decisions or awards rendered against an insured, under the provisions of the law imposing liability for compensation, subject to the provisions, conditions and limitations of this policy. This policy shall govern as between an insured and us as to payments by either in discharge of an insured's liability for compensation.

e. The residence employee has a first lien upon any amount which we owe you on account of this insurance. In case of your legal incapacity or inability to receive the money and pay it to the residence employees, we will pay it directly to the residence employee. Your obligation to the residence employee will be discharged to the extent of such payment.

Limits of Liability Coverage II

Our total limit of liability will not exceed $100,000 for all damages because of bodily injury:

a. sustained by one or more residence employees in any one accident or

b. caused by disease and sustained by a residence employee.

Our total limit of liability will not exceed $500,000 for all damages arising out of bodily injury by disease regardless of the number of residence employees who sustain bodily injury by disease.

Other Insurance

This Insurance does not apply to any loss to which other valid and collectible Workers' Compensation or Employers' Liability Insurance applies.

Conformity to Statute

Terms of this insurance which are in conflict with the California Workers' Compensation Law are amended to conform to that law.

Exclusions

This policy does not apply:

a. to liability for additional compensation imposed on an insured under Sections 4553 and 4557. Division IV, Labor Code of the State of California, because of the serious and willful misconduct of an insured, or because of bodily injury to an employee under 16

years of age and illegally employed at the time of injury;

b. to liability for bodily injury arising out of business pursuits of an insured.

c. Under Coverage II:

1. to liability assumed by the insured under any contract or agreement.

2. to bodily injury by disease unless a written claim is made or suit brought against the insured within 36 months after the end of the policy period.

3. to any obligation under a workers' compensation, unemployment or disability benefits law or any similar law.

All other provisions of this policy apply.

PREMISES ALARM OR FIRE PROTECTION SYSTEM

For a premium credit, we acknowledge the installation of an alarm system or automatic sprinkler system approved by us on the residence premises. You agree to maintain this system in working order and to notify us promptly of any change made to the system or if it is removed.

Includes copyright material of Insurance Services Office with its permission.

REPLACEMENT COST COVERAGE – PERSONAL PROPERTY

For an additional premium, we will settle losses to covered property at full replacement cost without deduction for depreciation, subject to the provisions of this endorsement.

DEDUCTIBLE

The deductible shown on the Declarations Page applies.

PROPERTY COVERED

- Personal property covered in Coverage C, except personal property stated in Property Not Eligible;
- If covered in this policy: awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to buildings.

PROPERTY NOT ELIGIBLE

The following items are not eligible for Replacement Cost Settlement:

- items of rarity or antiquity that cannot be replaced;
- articles whose age or history contributes substantially to their value. These include, but are not limited to, memorabilia, souvenirs and collectors' items.
- motorized golf carts and their equipment and accessories.

Any loss to this property will be settled as described in Loss Settlement, item b below.

LOSS SETTLEMENT

SECTION I – CONDITIONS, item 3. Loss Settlement does not apply to property covered by this endorsement.

a. For property that is covered by this endorsement, it is our option to:

(1) replace, or pay you our cost to replace the property with new property of like kind and quality without deduction for depreciation, or

(2) pay you the cost to repair or restore the property to the condition it was in just before the loss.

If you do not wish to have the property replaced, repaired or restored, we will pay you the smaller of:

(3) our cost to replace the property without deduction for depreciation, or

(4) the cost to repair or restore the property to the condition it was in just before the loss.

When the cost to repair or replace is more than $500, we will pay no more than actual cash value until repair or replacement is completed.

You may make a claim for loss on an actual cash value basis and then make claim within 180 days after the loss for any additional liability under the terms of this endorsement.

b. For property that is not eligible for replacement cost settlement, it is our option to:

(1) pay you the actual cash value; or

(2) replace, or to pay you our cost to replace the property with property of like kind, quality and condition; or

(3) pay you the cost to repair or restore the property to the condition it was in just before the loss.

We will not pay more than the Limit of Liability that applies to Coverage C. Nor will we pay more than any Special Limits of Liability that apply as stated in the policy to which this endorsement is attached.

REPLACEMENT COST DEFINED

Replacement Cost means the cost, at the time of loss, of a new item identical to the one damaged, destroyed or stolen. If an identical item is no longer manufactured or cannot be obtained, replacement cost will be the cost of a new item which is:

- similar to the insured article, and
- of like quality and usefulness.

All other provisions of this policy apply.

ADJUSTED BUILDING COST ENDORSEMENT

It is agreed that the limit for SECTION I. Coverage A – Dwelling, shown in the Declarations of this policy, will be adjusted at each policy renewal. This adjustment will reflect the rate of change in the Boeckh Building Cost Index Numbers published by the Boeckh Division of American Appraisal Company, Inc. The resulting limit will be rounded to the nearest $100.

SECTION I. Coverages B (Other Structures), C (Personal Property) and D (Loss of Use) will also be adjusted. The

rules then in use by us will determine the new limits for these coverages.

These limits will not be reduced without your consent.

You have the right to refuse any resulting change in limits. You must do so in writing before the effective date of such change. If you do reject the new limits, we will delete this endorsement from your policy.

We have the right to change to another cost index as of any renewal date. We will give you at least 30 days prior written notice if we do this. Such change must apply to all similar policies issued by us.

All other provisions of this policy apply.

COMPLAINT NOTICE

SHOULD ANY DISPUTE ARISE ABOUT YOUR PREMIUM OR ABOUT A CLAIM THAT YOU HAVE FILED, WRITE OR CALL US.

IF THE PROBLEM CANNOT BE RESOLVED, YOU MAY WRITE OR CALL THE:

CALIFORNIA DEPARTMENT OF INSURANCE
CONSUMER SERVICES BUREAU
600 SOUTH COMMONWEALTH
LOS ANGELES, CALIFORNIA 90005

TELEPHONE: 1-800-233-9045

NOTICE OF INFORMATION PRACTICES

When you applied for insurance with USAA, USAA Casualty Insurance company, or USAA General Indemnity Company, you entrusted us with some personal

information about yourself. This notice briefly describes our practices regarding such information including how we gather it, how we protect it, and how you can help ensure its accuracy.

THE COLLECTION OF INFORMATION

We must obtain certain information about an insured in order to properly evaluate and rate each risk. In most cases, the application you complete gives us all the information we need to evaluate you or your property for insurance. Should we need additional information or want to verify information you have given us, we will contact you, either by phone or mail.

In some insurance transactions, we may not be able to get all the information we need directly from you. In that case, we may obtain information from outside sources. For example, with auto insurance, we may obtain a record of accidents, violations and convictions from your state motor vehicle department. With property insurance, on homes or boats for example, we may ask an independent agency to prepare a report on that property concerning its value and condition.

THE DISCLOSURE OF INFORMATION

Information about you is kept in our records. We will refer to and use that information for purposes of issuing and servicing insurance policies and settling claims. We treat information about you as confidential, but in certain circumstances may disclose the information to others without your authorization. For example, information

about you may be exchanged with our claims adjusters who become involved in the settlement of a claim.

HOW YOU CAN GAIN ACCESS TO INFORMATION

You have a general right of access to the information about you in our records. You also have the right to request that we correct, amend or delete any information which is not accurate. Upon request, we will provide you with a more detailed notice of our collection, disclosure and policy access practices.

IMPORTANT NOTICE – CALIFORNIA WORKERS' COMPENSATION

Under California Law, you as the owner or occupant of a California residence have the responsibility of providing workers' compensation benefits for people you hire to do work around your home such as cleaning help, gardeners, babysitters, etc. if they worked for you at least 52 hours and you paid them wages of at least $100 during the 90 days preceding the date of any injury.

Your policy automatically provides Workers' Compensation coverage for occasional or part-time residence employees who meet the above eligibility requirements. If the occasional or part-time employee works less than 20 hours per week, there is no additional premium charged.

Residence employees (working 20 hours or more per week and more than 10 days in a period of 90 consecutive days) are considered full-time employees, and workers' Compensation coverage must be added to your policy.

The premium charge for this coverage will be based on the number of full-time residence employees and the length of employment.

FAILURE TO REPORT FULL-TIME EMPLOYEES COULD IMPAIR YOUR PROTECTION.

If you have any full-time residence employees not previously reported to us, please complete the lower portion of this form and return it within thirty (30) days so that your exposure under the Workers' Compensation Law can be fully protected. If you currently do not have any full-time residence employees, but acquire one in the future, please let us know.

Full Time Inservants

(one whose duties are primarily inside the house and works 20 hours or more per week, expected to work more than 10 days in a period of 90 consecutive days.

Example: Cook, Maid, Babysitter)

	Type of Work	Date Hired	Date Left Employment
1.			
2.			
3.			

Full Time Outservants

(one whose duties are primarily outside the house and works 20 hours or more per week, expected to work more than 10 days in a period of 90 consecutive days.

Example: Gardener)

	Type of Work	Date Hired	Date Left Employment
1.			
2.			
3.			

Name (Please Print) USAA Number Policy Number

Address

Signature Date

STATE PREMIUM SURCHARGE

Companies writing property and casualty insurance business in your state are required to participate in the Insurance Guaranty Association. If a company is unable to discharge its obligations, due to insolvency, the association will stand by the company's insurance contracts and settle its unpaid claims. To cover these losses, the association assesses insurers an amount equal to their fair share of losses during the previous year.

State law requires all companies to surcharge policies to recover these assessments. The State Premium Surcharge,

reflected on your policy declarations and billing statement, is based on our share of the association's assessment. This is not an increase in your rates. The funds are collected by USAA and remitted to your state guaranty association for its continued operation.

/s/ James A. Patterson
JAMES A. PATTERSON
Senior Vice President
Property & Casualty Operations

PAUL R. FINE, ESQ.
DANIELS, BARATTA & FINE
1801 Century Park East, 9th Floor
Los Angeles, California 90067
(213) 556-7909

Attorneys for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendants.	CASE NO. 91 3615 JSL (GHKX) NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES Date: September 3, 1991 Time: 1:00 p.m. Courtroom 4 (Filed July 29, 1991) Federal Rules of Civil Procedure Rule 12(b)(1)

TO PLAINTIFFS LAUGHLIN E. WATERS AND VOULA D. WATERS AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on September 3, 1991, at 1:00 p.m. or as soon thereafter as the matter may be heard in Courtroom 4 located at 312 North Spring Street, Los Angeles, California, defendant UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") will move the Court for an Order dismissing the instant action pursuant to *Federal Rules of Civil Procedure* Rule 12(b)(1).

This motion will be made on the grounds that this court lacks subject matter jurisdiction to hear this matter as there is a lack of diversity between the parties.

Said motion will be based on this notice, the Memorandum of Points and Authorities attached hereto, the Affidavit of Thomas J. Corridan, all documents on file herein, and on such other oral and documentary evidence as may be presented at the time of the hearing on this matter.

DATED: July 26, 1991

DANIELS, BARATTA & FINE

By /s/ Paul R. Fine
PAUL R. FINE
Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE ASSOCIATION

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

This is an action for breach of the duty of good faith and fair dealing arising out of an insurance contract. Plaintiffs allege diversity jurisdiction based on the contention

that they are citizens of the State of California and that defendant UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") is a citizen only of the State of Texas. As discussed below, USAA is an unincorporated association with members residing in the State of California and, accordingly, is also considered a citizen of the State of California. Thus, diversity jurisdiction does not exist.

II.

LEGAL AUTHORITY

Pursuant to 28 U.S.C. Section 1332(a), this Court may only exercise diversity jurisdiction when the parties are citizens of different states. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed 435 (1806).

> " 'For purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association.' " *Tuck v. United Services Automobile Association*, 859 F.2d 842, 844 (10th Cir. 1988) *citing Jett v. Phillips & Assoc.*, 439 F.2d 987, 990 (10th Cir. 1971); *see United States Steel Workers of America v. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965); *see generally* 138 C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* (2d ed. 1984 Section 3630.

III.

PLAINTIFF HAS THE BURDEN OF PROOF TO SHOW JURISDICTION

As stated in *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389 13th Cir. 1984):

"The party seeking to invoke jurisdiction has the burden of establishing that jurisdiction exists. . . . If there is a dispute about the jurisdictional facts, the plaintiff will have to establish them by a preponderance of the evidence at a preliminary hearing or at trial. [Citations omitted.]" *Id.* at 1392.

IV.

USAA IS A CITIZEN OF THE STATE OF CALIFORNIA

USAA is an unincorporated association and accordingly, all members of the association must be diverse from the opposing party. *Rockwall International Credit Corp. v. U.S. Aircraft Insurance Group*, 823 F.2d 302 (9th Cir. 1987). As clearly shown in the Affidavit of Thomas J. Corridan, attached hereto as Exhibit 1, USAA is an unincorporated association that has over 186,556 members in the State of California.

The case of *Tuck* is directly on point. In *Tuck*, the identical question against the identical defendant was at issue. The court in *Tuck* found that since plaintiffs were citizens of Oklahoma and since USAA had members who were citizens of Oklahoma, diversity jurisdiction did not lie. *Id.* at 844-846.

V.

CONCLUSION

Accordingly, as this action contains plaintiffs and defendants who are citizens of the State of California, diversity

jurisdiction does not lie and this matter must be dismissed.

DATED: July 21, 1991

Respectfully submitted,

DANIELS, BARATTA & FINE

By /s/ Paul R. Fine
PAUL R. FINE
Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE ASSOCIATION

STATE OF TEXAS)
) ss
COUNTY OF BEYAR)

UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS	)	
vs	)	Case No. 91 3615JSL (GH KY)
UNITED SERVICES AUTOMOBILE ASSOCIATION	)	

AFFIDAVIT

Before me, the undesigned authority, on this personally appeared, THOMAS J. CORRIDAN, known to me, as being first duly sworn, deposes and states the following, to wit:

I am THOMAS J. CORRIDAN of legal age, residing in the State of Texas. I am employed by UNITED SERVICES AUTOMOBILE ASSOCIATION, incorrectly sued herein as UNITED SERVICE AUTOMOBILE INSURANCE COMPANY (USAA), as Associate Claims Counsel.

In the above-stated capacity, I affirm that UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA) is a reciprocal inter-insurance exchange, domicile in Texas and licensed under Capter [sic] 19 of the Texas Insurance Code. USAA is an unincorporated association licensed to do business as a property/casualty insurer in all fifty states, as well as certain foreign locations. USAA currently has over 186,556 members domiciled in the State of California, including member Laughlin E. Waters.

/s/ Thomas J. Corridan
THOMAS J. CORRIDAN
ASSOCIATE CLAIMS COUNSEL
UNITED SERVICES
AUTOMOBILE ASSOCIATION

Subscribed and sworn to (illegible) before this 25th day of July , 1991.

/s/ Illegible
Notary Public

STATE OF TEXAS)
) ss
COUNTY OF BEYAR)

UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS	)	
vs	)	Case No. 91 3615JSL (GH KY)
UNITED SERVICES AUTOMOBILE ASSOCIATION	)	

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In the above-stated capacity, I affirm that UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA) is a reciprocal inter-insurance exchange, domicile in Texas and licensed under Capter [sic] 19 of the Texas Insurance Code. USAA is an unincorporated association licensed to do business as a property/casualty insurer in all fifty

states, as well as certain foreign locations. USAA currently has over 186,556 members domiciled in the State of California, including member Laughlin E. Waters.

/s/ Thomas J. Corridan
THOMAS J. CORRIDAN
ASSOCIATE CLAIMS COUNSEL
UNITED SERVICES
AUTOMOBILE ASSOCIATION

Subscribed and sworn to (illegible) before this 25th day of July , 1991.

/s/ Illegible
Notary Public

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN OPPOSITION TO MOTION TO DISMISS REQUEST FOR SANCTIONS MEMORANDUM OF POINTS AND AUTHORITIES Date: November 8, 1991 Time: 8:30 a.m. Room: To be assigned (Judge Wm. Fremming Nielsen)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs LAUGHLIN E. WATERS and VOULA D. WATERS hereby oppose the Motion to dismiss of defendant UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") on the grounds that diversity jurisdiction does exist.

PLEASE TAKE NOTICE THAT PLAINTIFFS FURTHER MOVE THIS COURT FOR AN AWARD OF SANCTIONS AGAINST USAA under F.R.C.P. Rule 11 on the grounds that USAA has engaged in a systematic, self-serving abuse of Federal Court processes by fraudulent means, including the signing of conflicting documentation under oath, for the purpose of manipulating Federal court jurisdiction.

Plaintiffs' opposition and request for sanctions is based on this Opposition, the attached Memorandum of Points and Authorities, the concurrently-filed Addendum, the concurrently-filed Declaration of Patrick Carr, all papers, pleadings and records on file in this action and on such other and further argument and evidence as may be presented.

Dated this 15 day of October, 1991 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

1.

INTRODUCTION

This memorandum vividly demonstrates that United Services Automobile Association, one of the largest insurance companies in the world (herein "USAA"), has engaged in a massive, widespread and fraudulent scheme to mislead the Federal courts and to manipulate federal court jurisdiction to suit its own purposes. The magnitude, arrogance and self-serving abuse practiced by USAA over a prolonged period of time is a matter which deserves the most serious judicial consideration and requires the severest of sanctions sufficient to punish USAA and in order to deter future abuse by it and others.

The means to carry out its outrageous activity have been false and fraudulent misrepresentations to courts and litigants, both under oath and in USAA's pleadings. USAA's purpose in engaging in this longstanding fraudulent activity has been to invoke federal court jurisdiction wherever USAA deemed it to be to its advantage to be in Federal court and to defeat Federal court jurisdiction

wherever it was to USAA's advantage to be in state court. For example, USAA would bring actions in, or remove actions to, Federal court on the basis of diversity of jurisdiction. Then, if the case "went bad" for it, USAA would assert a purported lack of diversity jurisdiction as a means for escaping an adverse judgment and would thereby discourage its opponent from continuing litigation. Conversely, if the case went well for USAA, no mention of the purported lack of subject matter jurisdiction would be raised by it and the final judgment entered to its benefit would remain secure.

The centerpiece of USAA's nefarious scheme is the legal status of USAA. If it is truly a traditional unincorporated association, as it has claimed from one side of its mouth, then USAA argues there is no diversity jurisdiction since obviously some of its millions of policyholders reside in virtually every state.[1] If its status is corporate, as it has acknowledged from the other side of its mouth, then diversity of jurisdiction would lie under current diversity case law.

In this case, USAA seeks to avoid federal court jurisdiction because it is obviously in USAA's best interest to be out of Federal court. The plaintiffs in this case are a well-respected, senior district court federal judge and his wife who seek fire insurance benefits from USAA after

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[1] Attached as Exhibit II to the concurrrently-filed Addendum is a true and correct copy of *National Underwriter Profiles*, 1991, Property/Casualty Insurers, Financial and Underwriting Performance Results, p. 694. As reflected there, USAA is authorized to write insurance in every state of the union, Guam, Puerto Rico, D.C. and the Virgin Islands.

their house was devastated by fire on December 17, 1990. The Waters claim serious violations of the duty of good faith owed to them by USAA, which eventually caused multiple hospitalizations of Judge Waters' wife for anxiety, stress and high blood pressure.

It is truly ironic that USAA cites the case of *Tuck v. USAA*, 859 F.2d 842 (1988), in support of its motion to dismiss in this case. It was in *Tuck* that the scope and pervasiveness of USAA's manipulation and abuse of litigants in federal courts was first uncovered.

Even more ironic is that the *Tuck* decision, which is relied upon by USAA in this motion, has been castigated and condemned by USAA itself. In its writ of certiorari to the United States Supreme Court, USAA said that the *Tuck* decision exceeds the Federal court's jurisdictional bounds and is an illegitimate exercise of power because the *Tuck* court gave remand instructions and suggested sanctions.[2]

Indeed, the *Tuck* decision itself is a prime example of USAA's misdeeds. The decision was based upon misleading information provided to the court and the making of knowingly-erroneous arguments to the court, all for the purpose of escaping a judgment. USAA failed to acknowledge before the *Tuck* court, as it had before other Federal courts, that it is a reciprocal interinsurance exchange, and therefore is a corporate creature for diversity jurisdiction purposes. This very vital information and these critically-important arguments had been used previously by USAA to obtain Federal court jurisdiction

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[2] See Exhibit "J" to Addendum

when it suited USAA to have such jurisdiction, as will be shown below.

Furthermore, this accurate information, which revealed the proper effect of USAA's status as a reciprocal interinsurance exchange has been withheld from this Court as well. Although the affidavit submitted in support of its motion to dismiss mentions in passing that USAA is a reciprocal interinsurance exchange, USAA's entire points and authorities deals with the diversity issue as it relates to an unincorporated association. USAA, however, completely fails to provide the legal argument, which USAA itself has relied upon in other cases, that such an interinsurance exchange is akin to a corporation for purposes of diversity jurisdiction.

In *Tuck*, there was a Federal court judgment rendered against USAA in the sum of $900,000.[3] Only after the entire trial, after judgment was rendered and only upon appeal did USAA bring a motion to dismiss on the basis of the lack of subject matter jurisdiction. It was in the *Tuck* case that USAA's jurisdictional hopscotching was first noticed and berated by the Tenth Circuit Court of Appeals. Upon remand, and the suggestion of a sanctions motion, a more full and complete investigation of USAA's past activities was conducted. After the investigation revealed USAA's massive and widespread scheme to manipulate the court system, a sanctions motion was filed in the trial court seeking $1 million in sanctions. This sanctions motion was pending in the *Tuck* case when

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[3] That judgment was ultimately reduced by the trial court to $775,000 in response to USAA's motion for new trial.

USAA rushed to settle the case by payment of the full judgment in order to avoid having its dishonorable and disrespectful conduct spread upon the record and in order to avoid facing sanctions for its fraudulent activity upon the Federal courts.

As set forth below, both in the Memorandum of Points and Authorities and the addenum filed concurrently, there are *at least 172 other known cases*[4] in which USAA has perpetuated a fraud upon litigants and the Federal courts in order to manipulate jurisdiction for its own purposes. More startling, USAA has continued this conduct in some cases even since the *Tuck* decision in which the Tenth Circuit berated USAA for its unseemly conduct. USAA's conduct should not go unchecked or unpunished.

In support of its motion to dismiss in this case, USAA submits an affidavit stating that it is an unincorporated association with policyholders residing in California. However, this affidavit directly conflicts with its allegations in pleadings, many verified, and other affidavits in other Federal cases, in which USAA swore, and persuasively argued, that it was a corporate citizen of the State of Texas for diversity purposes.

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[4] See Addendum, pp 1-34.

2.

USAA HAS ENGAGED IN A DELIBERATE SCHEME TO FRAUDULENTLY MANIPULATE FEDERAL COURT JURISDICTION TO THE DETRIMENT OF LITIGANTS AND THE FEDERAL COURT, AT BOTH THE TRIAL COURT LEVEL AND APPELLATE COURT LEVEL.

In *Tuck*, the very case cited by USAA in this motion to dismiss, USAA waited until after a judgment in favor of the plaintiffs for $900,000, later reduced to $775,000 by the trial court, was rendered before raising the jurisdictional issue. The most striking evidence of USAA's outrageous conduct is found in several cases on appeal in other circuits at the time USAA was arguing in *Tuck* that there was no federal court jurisdiction.

Incredibly, after USAA argued no diversity jurisdiction in its appeal in *Tuck*, USAA appeared at least three times before a Court of Appeal in sister circuits under exactly the same circumstances, only in those cases USAA did not seek to dismiss those cases for lack of subject matter jurisdiction because USAA would stand to lose if it did so.

The decision of the Tenth Circuit Court in *Tuck* was handed down on October 14, 1988. Two weeks later, on October 31, 1988, USAA filed a complaint in the U.S. District Court for the Northern District of Ohio as subrogee of its insured, seeking damages for negligence, master-servant vicarious liability, and indemnity.[5] In its opening paragraph, USAA stated that "United Services Automobile Associaton ("USAA") is a *corporation* organized pursuant to the laws of the State of Texas with its

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[5] *USAA v. Barger*, Addendum, p. 1: Exhibit "A", Case #3

principal place of business located in San Antonio, Texas". (Emphasis added.) In paragraph six of its Complaint, USAA states that, "Jurisdiction of this Court is founded on Title 28, U.S.C. Section 1332 and 2201, Plaintiff and defendant not being citizens of the same state . . . "[6]

Thus, only two weeks after prevailing upon the *Tenth* Circuit to adopt the *Second* Circuit's holding in *Baer* that USAA is an unincorporated association whose citizenship is that of all of its members, USAA shamelessly proceeded to invoke the jurisdiction of a federal court in the *Sixth* Circuit, acknowledging it is a Texas corporation whose citizenship is diverse from that of the defendant, a resident of Pennsylvania. At the same time it sought to vacate a judgment for $775,000.00 in one circuit for lack of subject matter jurisdiction, it filed suit to *obtain* a judgment for $300,000.00 in another on the basis of the very same jurisdiction.

In another case, USAA filed suit for declaratory judgment in the United States District Court for the Eastern District of Pennsylvania, December 4, 1987, eighteen month *after* filing its Suggestion of Lack of Subject Matter Jurisdiction and Motion to Dismiss in *Tuck*, which was filed April 15, 1986.[7] Again, as in *Barger, supra* USAA made contradictory jurisdictional allegations.

In paragraph two of the Complaint for Declaratory Judgment in that case, USAA alleged that, "The plaintiff,

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[6] See Addendum, pp. 53-4: Exhibit "I" – USAA's Complaint in *USAA v. Barger*, filed 10/31/88.

[7] *USAA V. Evangelista*, Addendum: Exhibit "A" –Case #12.

United Services Automobile Association (USAA), is incorporated under the laws of the State of Texas, with its principal place of business in San Antonio, Texas". Paragraph four alleges that, "The court has jurisdiction by virtue of 28 U.S.C., Section 1332". Paragraph five then claims that, "An actual controversy of justiciable nature exists between the plaintiff and defendant, who are citizens of different states . . . " Such statements are utterly irreconcilable with the exact opposite assertions in its Motion pending before this Court. Nevertheless, *the Complaint was verified as "true and correct" by its counsel,* Mr. Bruce S. Pancio.[8]

In *Evangelista,* USAA's Motion for Summary Judgment was granted on October 13, 1988, just as the *Tuck* decision was handed down. *USAA v. Evangelista,* 698 F.Supp. 85 (E.D. Pa. 1988). Evangelista then appealed on November 1, 1988. That appeal was pending before the United States Court of Appeals for the Third Circuit *after* the Tenth Circuit court concluded, at USAA's instigation, that diversity jurisdiction did not exist in *Tuck.* USAA failed to file any papers suggesting any lack of subject matter jurisdiction with the Third Circuit. The Court of Appeals for the Third Circuit, ignorant of USAA's jurisdictional manipulation, handed down its decision affirming the trial court's judgment in USAA's favor on March 10, 1989, five months *after* the decision in *Tuck.*

In a more startling case, USAA practiced its systematic district court manipulation on the Ninth Circuit Court.

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[8] See Addendum, pp. 63-5: Exhibit "M" – USAA's Complaint in *USAA v. Evangelista,* Case #12, filed 12/4/87.

That case was originally filed by USAA in the District of Hawaii on April 3, 1984, shortly before the jury verdict in *Tuck*.[9] Again, USAA made jurisdictional allegations in its Complaint acknowledged its status as a Texas corporation for diversity purposes.

Paragraph two of USAA's Complaint in the *HIG* case states that, "Plaintiff is a corporate citizen of Texas, Incorporated in and having its principal place of business in the State of Texas". Paragraph three then states that, "Defendant Hawaiian Insurance Company and Guaranty Company, Ltd. ("HIG") is a corporate citizen of Hawaii, incorporated in and having its principal place or places of business in states other than the State of Texas".

Paragraph four makes the same allegation of Travelers Insurance Companies, "A corporate citizen of Connecticut". Conspicuous by its absence is any allusion to the unincorporated association status it alleged in *Tuck* and in this case. In paragraph eight, USAA concludes that, "This Court has jurisdiction because of diversity of citizenship of the parties".[10]

The *HIG* case, in which USAA itself invoked Federal Court jurisdiction under the diversity rules, continued for several years. On October 6, 1987, while USAA's Motion to Dismiss was pending in *Tuck*, USAA filed a Scheduling Conference Statement in *HIG* affirming diversity jurisdiction.[11] USAA filed a motion for summary judgment on

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[9] *USAA v. Hawaiian Insurance and Guaranty Co., Ltd.*, Addendum, P. 2: Exhibit "A" – Case #7.

[10] See Addendum, pp. 66-7: Exhibit "N-1": – USAA's Complaint in *USAA v. HIG*, Case No. 7, filed 4/3/84.

[11] Addendum, p. 69: Exhibit "N-2".

February 29, 1988, which was granted and which awarded USAA a $300,000 judgment. This came long after USAA had already sought to dismiss *Tuck* for lack of diversity jurisdiction in order to avoid a judgment. Thus, USAA was awarded a judgment in excess of $300,000.00 by a Federal Court at the very same time it was seeking to vacate a judgment in *Tuck* for that very same lack of jurisdiction.[12]

HIG appealed the order granting summary judgment in USAA's favor to the Ninth Circuit. While that case was on appeal to the Ninth Circuit, the Tenth Circuit Court rendered its decision in *Tuck*. In hindsight, it should come as no surprise that USAA did nothing to dismiss the action in *HIG* for lack of jurisdiction. On the contrary, USAA did everything it could to maintain its judgment in *HIG* and, in fact, the judgment of the trial court was affirmed on November 21, 1989.[13] Thus USAA secured its Federal court judgment a full eight months after its petition for writ of certiorari in *Tuck* was denied and that case became final.

It is impossible to escape a sense of outrage at the obvious fraudulent nature of USAA's actions in these three appeals. In each case it was USAA, which, as plaintiff, invoked the jurisdiction of the federal court, acknowledging its status as a Texas corporation. In each case, USAA either itself appealed, or took part in an

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[12] Attached as Exhibit JJ to the Addendum is a chronology of the relevant interrelationship of the dates of the other cited cases to the events in the *Tuck* case.

[13] See Addendum, pp. 2, Case No. 7.

appeal, after the *Tuck* decision, and affirmatively asserted Federal court jurisdiction.

The naked duplicity of USAA in this matter is strikingly demonstrated by the case of *Pridgen v. USAA*[14], from the middle District of Georgia. There USAA was sued in state court for its bad faith refusal to pay personal injury protection benefits to a minor child severely injured in an accident. USAA then filed a Petition for Removal in federal court on November 14, 1984, alleging jurisdiction under U.S.C.A. section 1332 because "Petitioners (sic) [USAA] are residents and citizens of the State of Texas". *This Petition was verified as "true and correct" by USAA's attorney.*[15]

In response, Pridgen moved to remand the case to state court on the grounds that "at the time of the filing of defendant's petition for removal of the action to this Court, both plaintiff and defendant were citizens of the State of Georgia," and that, therefore, the federal court was "without original and removal jurisdiction over the above-entitled action".[16]

It is fascinating, to read USAA's response, which proved to be so persuasive that *Pridgen's motion to remand was denied.* In its "Brief in Opposition to Plaintiff's Motion

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[14] Addendum, p. 16: Exhibit "A" – Case #72

[15] See Addendum, pp. 74-5: Exhibit "P-1".

[16] See Addendum, pp. 76-7: Exhibit "P-2" – Plaintiff's Motion to Remand and Brief in Support of *Pridgen v. USAA*, Case No. 72, filed 11/20/84.

to Remand"[17], USAA admitted it is a reciprocal interinsurance exchange, and, further, acknowledged that "for purpose of 28 U.S.C. section 1332, USAA should be considered a citizen of Texas", a position exactly opposite to that in *Tuck* and in this case.

USAA went on to point out that "[u]nder Texas law, such exchanges are similar, if not identical to, corporations."[18] USAA cites the case of *Wilson v. Marshall*, 218 S.W.2d 345, 346 (1949), in which the Court of Civil Appeals of Texas stated as follows:

> The subscribers at a reciprocal exchange are not only policyholders thereat[sic] and as such entitled to the protection afforded by the policies and required to pay the premiums stipulated in the policies; but they also own the insurance business just as stockholders own their corporation.

Additional "indicia" of its corporate status, USAA told the *Pridgen* court, is the fact that it is the parent company in an insurance holding company system regulated by the Texas Insurance Code and owns all the stock of several subsidiary corporations. "Also," the Brief went on, "like a corporation, USAA is controlled by a board of directors, has officers, and is governed by a set of bylaws."[19] USAA then made the following statement:

> An examination of the Texas statutes pertaining to reciprocal interinsurance exchanges indicates

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[17] See Addendum, p. 81-2: Exhibit "P-3", filed 11/29/84, at 2.

[18] Addendum, p. 83: Exhibit "H", at 6.

[19] Addendum, p. 84: Exhibit "P-3" at 7.

> that such exchanges may be corporations. In fact, such an examination reveals that the term "reciprocal exchange" is less a description of the type of business organization than it is a description of the type of insurance arrangement.[20]

Moreover, USAA continued, "reciprocal insurance exchanges are subject virtually to the same regulatory scheme as corporations". Additionally, USAA is the parent company of a number of subsidiary companies and regardless of which subsidiary one is in fact dealing with, all communications are directed to the same corporate headquarters in San Antonio, Texas. Therefore, so we are told, "one can conclude that the parent and subsidiaries are really one and the same and should be treated as one corporation". This argument is rather like piercing the corporate veil, only in reverse. USAA would assume the corporate character of its alter egos, when it suits USAA to do so. "Clearly", the Brief concluded, "USAA is a corporate entity in everything but name."[21]

USAA was then faced with the task of refuting the decision in *Baer v. USAA*, 503 F.2d 393 (2nd Cir. 1974), which reached the opposite conclusion. In that case, USAA argued, "The parties were unable to bring most of the facts relied upon herein to the Court's attention". Additionally, USAA, went on, "*Baer* was decided in 1974, and, while it may have been a smaller operation then, which more closely resembled a voluntary association,

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[20] Addendum, p. 85: Exhibit "P-3" at 8, (Emphasis added.)

[21] Addendum, p. 85: Exhibit "P-3" at 8.

today it is clearly a huge corporate organization".[22] USAA even cited, as did the plaintiffs in *Tuck*, the case of *USAA v. Glen Falls Insurance Company*, 429 F.Supp. 101, 105 (D. Conn. 1976), which described USAA as a "Texas corporation" and found diversity jurisdiction on that basis.[23]

Finally, USAA argued in *Pridgen* that its principal place of business, as a holding company, is considered to be the location of its "nerve center", *i.e.*, "the location from which the corporation's officers direct, control, and coordinate all activities without regard to location, in the furtherance of the corporate objective", quoting *Lugo Vina v. Pueblo Int'l. Insurance*, 574 F.2d 41, 43 (1st Cir. 1979). USAA then located that point of control quite precisely. "Since all officers operate out of San Antonio, Texas, that is the 'nerve center' and principal place of business of United Services Automobile Association."[24]

The Trial Court in *Pridgen* found USAA's acknowledgment of its corporate status convincing. It denied plaintiff's Motion to Remand in an Order dated December 14, 1984 and invoked federal jurisdiction.[25] If the *Pridgen* case tells us anything, it is that USAA knows no shame.

In line with its pattern of manipulation, USAA actively concealed the legal argument it relied on in

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[22] Addendum, pp. 86-7: Exhibit "P-3" at 9-10.

[23] Addendum, p. 87: Exhibit "P-3" at 10.

[24] Addendum, p. 87-8: Exhibit "P-3", at 10-11.

[25] See Addendum, p. 16, Case #72.

Pridgen regarding its corporate status from this Court. Although the affidavit presented by USAA concedes that USAA is a reciprocal interinsurance exchange, its entire legal argument is based on the assumption that such a reciprocal interinsurance exchange is nothing more than an unincorporated association when, in fact, USAA itself has admitted that such an organization is a corporation for purposes of determining diversity jurisdiction.

Several other appeals are worthy of note. Each case was on appeal while USAA's Motion to Dismiss was pending before the Tenth Circuit in *Tuck*. The Complaint in *Oss v. USAA*[26], was filed on January 11, 1985, in the Western District of Texas, the very district in which USAA is headquartered. Nevertheless, USAA failed to challenge diversity jurisdiction, either in the trial court or on appeal.

In *USAA v. Weappa*, Northern District of Alabama[27], USAA filed a Complaint on February 10, 1986, two months before the Motion to Dismiss in *Tuck*. The Complaint alleges diversity of citizenship as the basis of jurisdiction and prays for a declaratory judgment denying coverage.[28] The Pre-Trial Order, dated August 5, 1986, recites "the admitted diversity of citizenship".[29] The case was tried to the court and resulted in a verdict favorable to USAA on November 5, 1987. Weappa appealed. The Order of the Trial Court was affirmed on August 5, 1988,

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[26] Addendum: Exhibit "A" – Case #61.

[27] Addendum, p. 6: Exhibit "A" – Case #26.

[28] Addendum, p. 72: Exhibit "O-1".

[29] Addendum, p. 73: Exhibit "O-2".

shortly before the decision in *Tuck*. *USAA v. Weappa*, 856 F.2d 198 (5th Cir. 1988). Again, USAA does not hesitate to avail itself of the jurisdiction of one Court of Appeal, in this case that of the Eleventh Circuit, to uphold a judgment favorable to it, while at the same time seeking to vacate an unfavorable judgment in the Tenth Circuit Court of Appeal.

In *Gill v. Rollins Protective Services*, Eastern District of Virginia[30], USAA, the Gills' subrogated homeowners insurer, was added as a real party in interest by Rollins. This case was the subject of not one, but three different appeals. The first appeal was decided November 28, 1983, 722 F.2d 55. The Second appeal, was decided September 26, 1985, held that USAA had a valid right of subrogation, 773 F.2d 592. The third appeal was filed on December 19, 1987, eight months after the Motion to Dismiss in *Tuck*, and was decided on December 23, 1987, a year later, yet at no time did USAA claim before the Court of Appeal for the Fourth Circuit the very same lack of diversity it complained of in the Tenth Circuit. (836 F.2d 194.)

Another marathon case, or group of cases, arising out of the same fatal car wreck, went on appeal three different times. In the first of these cases, *Shine v. USAA*[31], USAA appealed. *Shine v. United Services Automobile Association*, 680 F.2d 1387 (5th Cir. 1982). In the second case arising out of the same collision, *Moore v. USAA*[32], the

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[30] Addendum, p. 38: Exhibit "A" – Case #38.

[31] Addendum: Exhibit "A" – Case #134.

[32] Addendum: Exhibit "A" – Case #58.

plaintiff appealed on January 31, 1986, shortly before the Motion to Dismiss in *Tuck*. The case was decided February 5, 1987. *Moore v. United Services Automobile Association*, 808 F.2d 1147 (5th Cir. 1987). *Moore v. USAA*[33] was appealed twice, first by Moore, November 20, 1985, and second by USAA, July 8, 1986, while its Motion was pending in *Tuck*. The case was decided on June 11, 1987.[34] The issue there was whether USAA had properly removed the case from state court. The Fifth Circuit ruled it had not, stating "Although Moore and USAA clearly are diverse, the bad faith claim is not separate and independent".[35] USAA did nothing to disabuse the Court of Appeal of the notion that "the citizenship of Moore, a Florida resident, is diverse from USAA, a Texas corporation".[36]

Incredibly, at the very time its belated challenge to jurisdiction was pending in *Tuck*, USAA argued *against* the Motion to Remand to state court for lack of jurisdiction in *Moore*.[37] USAA even sought sanctions for Moore's action in resisting summary judgment on the bad faith claim,[38] when it was USAA which should have been sanctioned, in the first place, for removing the case to federal court when it was claiming no Federal Court jurisdiction in *Tuck* and elsewhere. See *S.A. Auto Lube, Inc.*

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[33] Addendum: Exhibit "A" – Case #44.

[34] *Moore v. United Services Automobile Association*, 819 F.2d 101 (5th Cir. 1987).

[35] *Id.*, at 102.

[36] *Id.*

[37] *Id.* at 109.

[38] *Id.*

v. Jiffy Lube Int'l. Inc., 842 F.2d 946 (7th Cir. 1988); *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986). USAA even went so far as to appeal the denial of the sanctions it requested against Moore. (819 F.2d at 102).

Again, the conduct of USAA in all of these cases is nothing less than reprehensible. During the entire time USAA challenged jurisdiction in *Tuck*, USAA was seeking its own advantage in Federal court on the basis of the very same jurisdiction in other districts and in other circuits. If this conduct is not deserving of the most severe sanctions, nothing is.

USAA has *initiated* at least 71 actions in federal court since the 1974 decision in *Baer v. USAA*, 503 F.2d 393 (2nd Cir. 1974) in which the court held USAA was not subject to federal diversity jurisdiction on the basis of its *alleged* association status.[39] This includes at least 31 cases in which USAA has gone so far as to actually *remove* a case in which it was a defendant from a state court to federal court on the claim of diversity jurisdiction.[40] This is all the more remarkable in light of the fact that when it is to its own advantage, USAA claims to be a citizen of virtually every state of the Union.

Another case, *Stout, et al. v. Hamby and USAA*[41], from the Middle District of Louisiana, was removed by USAA on September 22, 1988, just before the Tenth Circuit's decision in *Tuck*. The removal petition alleged that USAA was "at the time of the filing of the Original Petition

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[39] See Addendum, Exhibit B, pp 35-36; Exhibit C, pp 37-39.

[40] See Addendum, Exhibit B, pp. 35-36.

[41] Addendum, p. 4: Exhibit "A" – Case #4.

herein, and as of the time of the filing of this Petition for Removal, a foreign insurer whose principal place of business and whose citizenship for purposes of diversity is a state other than the State of Louisiana". The Petition further claimed that "(f)ederal subject matter jurisdiction is proper under 28 U.S.C.A. 1441, and venue is proper under 28 U.S.C.A. 1391(a) and was also proper had the Petition originally been brought in United States District Court for the Middle District of Louisiana". This proceeding, the Petition alleged, was therefore removable under 28 U.S.C.A. 1441.[42]

Even more astonishing, if that is possible, are two related cases from the Northern District of Mississippi, removed by USAA on November 19, 1986, seven months *after* moving to dismiss in *Tuck*.[43] In its *verified Petition*, USAA alleges the case to be a "controversy between citizens of different states", identifies itself as a "corporate non-resident [sic] of the State of Texas" which "is not now and was not at the time of the institution of this action nor at any time a citizen or resident corporation of the State of Mississippi".[44] Although in its Response to Request for Admissions, dated June 8, 1988, USAA does state that it is a "reciprocal interinsurance exchange"[45], the Pretrial Order, dated July 7, 1988, and signed by USAA's counsel, recites diversity of citizenship as the basis for jurisdiction.[46]

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[42] See Addendum, pp. 89-91: Exhibit "Q".

[43] *Liles v. USAA*, Addendum, p. 7: Exhibit "A" – Case #30.

[44] Addendum, pp. 92-4: Exhibit "R-1".

[45] Addendum, p. 95: Exhibit "R-2".

[46] Addendum pp. 96-8: Exhibit "R-3".

One can only marvel at the devious ingenuity of USAA. The same procedural ploy used to vacate an unacceptable judgment in one case, is deftly turned into a device to preserve another judgment which suits it. If USAA might do better in state court, it argues one way; if it might do worse, it argues the other.

USAA apparently knows what it is doing when it removes cases to federal court. In only one of the removal cases uncovered did the plaintiff obtain a judgment against USAA. In five cases, judgment was for USAA. The rest were settled or remanded to state court.[47]

These removal cases demonstrate quite convincingly the egregious flaunting of the Federal Courts of which USAA has proven itself more than capable, time after time after time. Not only does USAA invoke the jurisdiction of the federal judiciary whenever it pleases, it at the same time seeks to divest the state court of its jurisdiction as well, all to gain a forum in which USAA feels its interest will be better served.

Second only to these removal cases are those in which USAA is the plaintiff. USAA has been the plaintiff in at least 41 cases since the *Baer* decision.[48] Of these, 17, almost half, were filed, or remained opened, after USAA filed its Motion to Dismiss in *Tuck*.

For example, in *USAA v. Arev*[49], paragraph one of the Complaint alleges that USAA is a "citizen of Texas by

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[47] See Addendum, p. 35: Exhibit "B".

[48] Addendum, Exhibit C.

[49] Addendum: Exhibit "A" – Case #1,.

virtue of its being incorporated under Texas law and by virtue of having its principal place of business in Texas", and paragraph six alleges diversity jurisdiction exists.[50]

On November 18, 1986, seven months after USAA filed its Motion to Dismiss in *Tuck*, it filed a Complaint for declaratory relief to determine it had no duty to defend or indemnify in a case then pending in state court. In *USAA v. Stryker*[51], USAA correctly identified itself as a "reciprocal inter-insurance exchange", and claimed diversity of citizenship.[52] In *USAA v. Krieger*[53], USAA filed another declaratory action on July 25, 1986, which resulted in a judgment for USAA on March 19, 1987.

USAA obtained summary judgment on August 1, 1986, in a declaratory action in the District of Hawaii, *USAA v. Ah Moo*[54]. The Complaint filed on June 4, 1985, alleges that USAA is a Texas corporation and that "every issue of law and fact herein is wholly between citizens of different states",[55] a claim repeated in USAA's Scheduling Conference Statement.[56]

Clearly, USAA does not shrink from seeking the aid of the same federal judiciary it condemns the Waters for turning to. It is only when the forum is disfavored, or the

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[50] Addendum, pp. 115-116: Exhibit "ST".

[51] Addendum, p. 7: Exhibit "A" – Case #31.

[52] Addendum, pp. 117-9: Exhibit "T".

[53] Addendum, p. 12: Exhibit "A" – Case #50.

[54] Addendum, p. 15: Exhibit "A" – Case #67.

[55] Addendum, p. 120-1: Exhibit "U-1".

[56] Addendum, pp. 122-23: Exhibit "U-2".

outcome unacceptable, that USAA claims a "lack of jurisdiction over the subject matter". USAA's selective use of the federal forum has proven nearly as effective in its plaintiff cases as in the cases it removes to federal court. USAA has lost only three: *Barger*, Case #3, which USAA appealed and which was affirmed; *Fuqua*, Case #25, in which USAA continued to contest attorney fees and costs for over a year; and *USAA v. Dubose*[57], Southern District of Mississippi, which USAA appealed, unsuccessfully, to the Fifth Circuit. *United Services Automobile Association v. Dubose*, 606 F.2d 320 (5th Cir. 1979).

There are also numerous cases where, as here, USAA has been sued as Defendant. These cases are less spectacular than the others in that USAA has not actually invoked federal jurisdiction, but has acquiesced in its assertion by the various plaintiffs. Of course, this, too, necessitates a responsive pleading by USAA, signed by its counsel. In many cases USAA filed a counterclaim, cross-claim, or third-party claim as part of its defense strategy. There, too, USAA is and has invoked federal jurisdiction.

There are at least 95 cases in which USAA is a defendant filed after the *Baer* decision was handed down.[58] There are some 38 cases brought against USAA after it moved to dismiss in *Tuck* or which remained open thereafter.[59] In only nine of these did USAA seek a dismissal. In at least 29 cases, USAA permitted itself to be sued

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[57] Addendum, p. 29: Exhibit "A" – Case #135.

[58] See Addendum, Exhibit D, pp. 40-44.

[59] See Addendum, p. 40: Exhibit "D".

without doing what it did in here, i.e., seek to have the suit dismissed because the trial court lacked jurisdiction over the subject matter of the lawsuit.[60]

For example, in *Smith v. USAA*[61], USAA was sued as a Texas corporation, and allowed the litigation to proceed without challenging federal jurisdiction. Of course, the verdict was only for $2,400.00 which may explain USAA's indifference to the dilemma of diversity.

3.

WHERE THERE IS CONFLICTING EVIDENCE AS TO CITIZENSHIP, THIS COURT MAY RESOLVE THE EVIDETIARY DISPUTE AND RULE ON THAT BASIS

USAA submitted, in support of its motion to dismiss, an affidavit that it is an unincorporated association under Texas law. However, as noted above, USAA has, in numerous other cases, actively and aggressively invoked Federal jurisdiction on the grounds that it is a corporation, a reciprocal inter-insurance exchange or otherwise a resident and citizen of Texas and not a citizen of any other state. Some of these assertions were also supported by verifications under oath. (See Addendum, Cases No. 12, 30 and 72 filed in support of the motion for sanctions, filed concurrently herewith.) As such, there is an evidentiary conflict as to USAA's citizenship.

Not only is the evidence on the issue of USAA's citizenship in conflict, so, too, is the law. As cited by

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[60] See Addendum, p. 3: Exhibit "F".

[61] Addendum: Exhibit "A" – Case #11.

USAA, the court in *Tuck* held that because USAA contended it was an unincorporated association, it was not subject to diversity jurisdiction. On the other hand, in *USAA v. Glen Falls Ins. Co.*, 429 F.Supp. 101, 105, the court concluded that USAA was a "Texas corporation" and found diversity jurisdiction on that basis. Plaintiffs are unaware of any Ninth Circuit decision concerning the issue of USAA's status for diversity purposes.

Also as noted above, USAA itself has acknowledged, admitted and convincingly argued that it is a Texas corporation for diversity purposes in *Pridgen v. USAA*[62]. The argument USAA made in *Pridgen*, i.e., that a reciprocal insurance exchange is a corporate creature, comports with California law as well. (See Insurance Code sections 1301, et seq.) As stated in *Mitchell v. Pacific Greyhound Lines*, 33 Cal.App.2d 53, 91 P.2d 176, 182:

> "A reading of the reciprocal act and of the liquidation act of this state . . . leads us to the conclusion that a reciprocal exchange is to be treated as an entity for the purposes of liquidation, as well as for the purposes of regulation and supervision."

In fact, under California law, no action may be brought against a subscriber in a reciprocal insurance exchange until a final judgment against the exchange itself remains unsatisfied for at least 30 days. (California Insurance Code section 1451.) Additionally, California Insurance Code section 1323 expressly provides that a reciprocal insurance exchange, in order to issue policies in this state, must consent to jurisdiction in actions

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[62] Addendum, p. 16: Exhibit "A" – Case #72.

"brought either in the county in which the person or property insured is located, or in which the exchange has its principal office or place of business in the State. . . ." Thus, California law, as well as Texas law, supports the conclusion that USAA is a corporate-type entity for purposes of diversity jurisdiction.

Because there is conflicting evidence, and conflicting law, regarding the diversity issue, this Court may determine credibility, resolve the factual disputes and determine the diversity issue on that basis. (*Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979).)

It is apparent that USAA's legal status has never had the benefit of an evidentiary hearing nor been fully briefed. This left USAA open to argue it was an unincorporated association when that view suited its objective of denying federal court jurisdiction and to argue that it was a corporation for the purpose of invoking federal court jurisdiction when that jurisdiction suited its purpose. This carefully cultivated practice has gone on for years and has resulted in depriving unsuspecting litigants of the proper court to try their case, in judgments in courts which may not have had jurisdiction, in defeating other judgments in which jurisdiction may have been valid, and in conflicting and wrongly decided decisions.

If necessary, this Court could hold an evidentiary hearing, and/or call for briefing, to determine once and for all whether USAA's status as a reciprocal insurance exchange under Texas law classifies it as a citizen of the State of Texas for jurisdictional purposes or whether it is truly an unincorporated association, as that term has

been used by the federal courts for jurisdictional analysis.[63]

4.

THE COURT HAS INHERENT POWER TO IMPOSE SANCTIONS; MOREOVER, SANCTIONS MAY BE IMPOSED UNDER F.R.C.P. 11.

The information on other cases presented here is relevant to determining both the existence of a deliberate strategy on the part of USAA to defraud and deceive, and also to access the amount of damages necessary to deter it. Rule 404 of the Federal Rules of Evidence specifically authorizes the admission of evidence of other crimes, wrongs, or acts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. That USAA's unconscionable behavior in this case was no accident is clear from a review of the evidence of USAA's calculated deception and systematic abuse of the federal courts of this nation. "A history of prior misconduct on the part of the defendant is a factor

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[63] In addition, there are other means by which this Court may retain jurisdiction of USAA in this action. Even if USAA were, in reality, an unincorporated association, FRCP 21 would permit amendment to dismiss the non-diverse members of the defendant. (*Newman-Green, Inc. v. Alejandro Alfonzo-Larrain, et al.*, 492 U.S. 932, 110 S.Ct. 12, 106 L.Ed.2d 627 (1989); *Dollar SS Lines v. Merz*, 68 F.2d 594 (9th Cir. 1934). Additionally, this Court could permit amendment to assert his action against USAA's attorney-in-fact as the representative of the class of diverse defendants. This is the very vehicle utilized by the District Court in *Tuck* after remand from the appellate court. (See Declaration of Patrick E. Carr.)

that militates in favor of imposing a stricter sanction." G. Joseph, *Sanctions: Federal Law of Litigation Abuse* 244 (1989). *Cf. McLaughlin v. Bradlee*, 803 F.2d 1197, 1206 (D.C. Cir. 1986) (Sanctions imposed as a matter of course of "harassment by litigation".)

In *Link v. Wabash R. Company*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962), the Supreme Court recognized as "well-acknowledged" the inherent power of a court to levy sanctions in response to abuse of litigation practices. See also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980). The inherent powers of federal courts are those which "are necessary to the exercise of all others", *Id.*, quoting *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812). "The inherent power to sanction is staggeringly broad. It applies to all proceedings, and no one is exempt from its reach", G. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, 25 (1989).

The Court has inherent power to impose reasonable and appropriate sanctions for abusive litigation practices or for violations of procedural rules or court orders. *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987). Courts under their inherent powers have developed a wide range of tools to promote efficiency in their court rooms and to achieve justice in their results. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 564 (3rd Cir. 1985). The contempt power is also rooted in the inherent power of the judiciary. *Levine v. United States*, 362 U.S. 610, 615, 80 S.Ct. 1038, 1042, 4 L.Ed.2d 989 (1960). "It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures, and to impose appropriate sanctions for failure to comply. The

authorities are all to the contrary." *Link v. Wabash R. Company*, 291 F.2d 542, 546 (7th Cir. 1961).

In *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 146 (W.D. La. 1989), the court imposed sanctions in the sum of $996,644.65 in attorneys' fees and expenses on a defendant who pursued a series of frivolous defenses to a valid contract, resulting in years of delay and fees and expense. "The shoe fits a frivolous defense as well as it does a frivolous cause of action." *Id.* at 144.

The Court in *Nasco* spoke of the "sordid, dishonest and deliberately unethical chain of events called a lawsuit" and accused the participants of engaging in a conspiracy unrestrained by "any sense of honesty, integrity or ethics", the very first act of which was to manufacture as a "defense" what was in reality nothing more than a "web of deliberate fabrications, misrepresentations and fraud, some of which were intended to mislead the public in general while others were aimed only at the Court and opposing counsel". *Id.* at 131. The same is true here, as well, only it is not just one lawsuit that is affected but an entire pattern of litigation by USAA which is "sordid", "dishonest", and "deliberately unethical", and not only one defense which is designed to mislead but a systematic scheme to manipulate the Federal court system.

Noting that NASCO's counsel represented not only NASCO but the public in seeking sanctions, *id.* at 138 n.10, and that sanctions other than expenses and attorneys' fees may be more appropriate, *id.* at 139, the Court in *NASCO* relied on its "inherent power to levy sanctions in response to abusive litigation practices", *id.*, and

awarded close to one million dollars in sanctions. *Id.* at 143. The Court stated that the wielding of its inherent power was particularly appropriate when the offending parties have practiced a fraud upon the Court, and that such power was incident to the Court's "duty to protect the integrity of the judicial process". *Id.* at 140. Here, too, the perpetrators are guilty of "acts which degrade the judicial system"; here, too, "the very temple of justice has been defiled". *Id.* at 139.

> The Courts should not hesitate to address and sanction similar transgressions in whatever the judicial theater they may occur. This case is as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce. *Id.* at 142-3.

Here, too, the sanctions should be "sufficiently severe to convince others that such tactics shall not be tolerated in the Courts of these United States". *Id.* at 143.

This Court has the inherent power to impose a variety of sanctions to regulate the docket, promote judicial efficiency, and to deter frivolous filings. *Casper v. Commissioner of Internal Revenue*, 805 F.2d 902, 906 (10th Cir. 1986); *Betz v. United States*, 753 F.2d 834, 835 (10th Cir. 1985).

Courts have previously expressed their concern that the inherent powers of a court, reinforced by the rules, including the employment of sanctions, to manage its docket be taken seriously at a time when both trial and appellate courts are faced with the task of ever burgeoning dockets. *D.H. Marketers, Inc. v. Freedom Oil and Gas, Inc.*, 744 F.2d 1443, 1444 (10th Cir. 1984). "There is a perceived growth in the use of sanctions at both levels to

insure the performance of the recently heightened duties of attorneys and parties in the process of reasonable and expeditious disposition of cases." *Id.* This includes a re-emphasis of the Court's inherent power to impose sanctions where necessary. *Id.* at n.1.

"To deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings." *Braley v. Campbell,* 832 F.2d 1504, 1510 (10th Cir. 1987).

This Court is faced with what appears to be a very serious, prolonged, knowing, and inexcusable imposition on the already overburdened Federal court system by a gigantic insurance company which does not hesitate to manipulate the courts to suit its purposes, invoking diversity jurisdiction here, denying it there, all as may suit its advantage. How better to punish USAA for its misdeeds, and deter both it and others from doing so again, than by imposing sanctions on USAA of sufficient magnitude to finally get its attention. There is no authority for the proposition that financial sanctions by a federal court or abuse of the judicial process before that court must be directly related to the other litigants' costs. *Eash v. Riggins Trucking,* 752 F.2d at 566.

Monetary sanctions may be the most effective way to deter a powerful and wealthy party from bringing frivolous or vexatious litigation. *Donaldson v. Clark,* 819 F.2d 1551, 1557 (11th Cir. 1987). The situation is very similar to the awarding of punitive or exemplary damages where the financial worth of the defendant may be taken into

account in arriving at the amount of damages required to deter others and to punish. *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 41 (Okla. 1984). The wealth of the defendant and the risk created by defendant's negligent conduct are substantial factors to be considered in calculation of punitive damages. *Silkwood v. Kerr McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985). In this case, the risk created is that judgments rendered in diversity cases involving USAA all over the country, past, present, and future, are, or will be, subject to being vacated with the resultant "enormous waste of judicial time and resources", *Tuck*, 859 F.2d at 846. Both injuries inflicted on the plaintiff and to society generally may be taken into account. *Silkwood*, 769 F.2d 1451.

USAA is a multi-*billion* dollar insurance company whose assets according to the latest financial report as it appears in Best's Key Rating Guide, Property Casualty Edition, 1991, total $5.6 *billion* and which maintains a policyholder surplus of 2.7 *billion*.[64] An appropriate monetary sanction, based on USAA's net worth and in an amount calculated to deter any further abuse of the Federal court system, would be $10,000.00 per case listed in the Addendum and *Tuck*, which amounts to $1.72 million in sanctions. Although such punishment may be viewed as severe by some, it is necessary in order to send a clear message to USAA that its conduct much [sic] stop. Moreover, this sanction constitutes less than *one-tenth of one percent* of USAA's surplus for 1990.

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[64] See Addendum, Exhibit HH.

5.

CONCLUSION

USAA's systematic manipulation of the Federal courts' jurisdictional rules must be stopped. USAA seeks to dismiss this case for no other purpose than its own self-interest. USAA should not be permitted to further exploit the rules and this action should be maintained by this Court. The motion to dismiss should therefore be denied.

As reflected in the addendum, the list of cases in which USAA has manipulated the Federal courts *literally* goes on and on. USAA's pattern of deliberate abuse of the Federal Courts is probably the most wide-spread, nefarious scheme perpetrated on the Federal courts in the history of the federal judiciary. USAA argues it is a corporation or a corporate-like entity when it suits USAA to be in Federal court and argues it is an unincorporated association when it suits USAA to get out of Federal court. This pattern of false and fraudulent conduct justifies the most severe sanctions. USAA has literally lied under oath to the Ninth Circuit Court and numerous others.

It is time for USAA to step up to the plate, admit its wrongdoing and allow this court to severely sanction it for the most widespread fraud ever committed upon the Federal court system. The Addendum lists 171 cases in addition to *Tuck* in which USAA falsely or fraudulently acted in regard to Federal jurisdiction. It is respectfully suggested that an award of sanctions in the amount of $1.72 million is essential to preserve the integrity of the Federal judiciary and to send a message to USAA and

others that manipulation of the Federal judiciary is a serious offense that is not to be tolerated.

Dated this 15 day of October, 1991 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: /s/ WMS
WILLIAM M. SHERNOFF
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On OCT. 15 1991, I served the foregoing document described as:

OPPOSITION TO MOTION TO DISMISS
REQUEST FOR SANCTIONS MEMORANDUM
OF POINTS AND AUTHORITIES

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on OCT. 15 1991, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO